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V. 2940

No. 14788

**United States,
Court of Appeals
for the Ninth Circuit**

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC., a Corpo-
ration, and M. L. BURR,

Appellees.

Transcript of Record

**Appeal from the United States District Court
for the District of Oregon**

FILED

NOV 10 1955

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-14-55

PAUL P. O'BRIEN, CLERK



No. 14788

United States'
Court of Appeals
for the Ninth Circuit

DOROTHY S. WALKER,

Appellant,

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In the United States District Court
for the District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

PRETRIAL ORDER

The above-entitled cause came on regularly for pretrial conference before the undersigned judge of the above-entitled Court on the 14th day of February, 1955. Plaintiff appeared in person and by Nels Peterson of her attorneys. Defendants appeared by John Gordon Gearin of their attorneys. The parties with the approval of the Court agreed to the following

Statement of Facts

I.

At all times mentioned herein, plaintiff was a resident and citizen of the State of Oregon; that the defendant West Coast Fast Freight, Inc., was a corporation organized and existing under and by virtue of the laws of the State of California, with an office and principal place of business in Portland, Multnomah County, Oregon; that the defendant M. L. Burr at the time of the service of process

was and is a resident, inhabitant and citizen of the State of Washington; that a diversity of citizenship exists between the plaintiff and both of the defendants and that the amount in controversy is in excess of \$3,000.00.

II.

At all times herein concerned, defendant West Coast Fast Freight, Inc., owned and operated a trucking service engaged in transporting cargoes and property within the State of Oregon and that the defendant M. L. Burr on May 3, 1953, was an employee of the defendant West Coast Fast Freight, Inc., in the capacity of a truck driver.

III.

On or about the 3rd day of May, 1953, an automobile operated by plaintiff was proceeding northerly on Highway 99E and at a point near Albany, Oregon, left the highway, as a result of which plaintiff received some injury.

Plaintiff's Contentions

I.

At the time and place of the accident, the defendants, and each of them, were negligent in one or more of the following particulars:

(a) In driving and operating said motor truck when the same was not equipped with clearance lamps and reflectors as required by law, or not having the clearance lamps lighted:

(b) In passing another vehicle proceeding in

the same direction as the motor truck when the left side of said highway was not clearly visible and free of oncoming traffic for a sufficient distance ahead to permit said truck to overtake and pass said other motor vehicle in safety.

(c) In driving said truck to the left side of the center line of said highway upon the crest of a grade and upon a curve of the highway where the driver's view was obstructed within a distance of 500 feet.

(d) In overtaking and passing another vehicle driving in the same direction as said truck at an intersection of highways when such movement could not be made in safety:

(e) In failing and neglecting to keep and maintain a proper or any lookout for other vehicular traffic, and particularly for the automobile operated by this plaintiff.

II.

That as a proximate result of the negligence of the defendants and each of them, plaintiff was forced off the road to avoid a head-on collision with the motor truck and caused this plaintiff severe personal injuries, among which were numerous bruises and contusions to the plaintiff's body, severe brain concussion and brain damage, severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her neck, back, pelvic area, right hip and leg, injuries to her upper chest,

and aggravation of pre-existing arrested tuberculosis, from all of which plaintiff was rendered sick, sore, nervous and distressed, that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest, and will be permanently afflicted with the results of aggravation and dissemination of said tuberculosis, and has been damaged in the sum of \$75,000.00 general damages.

III.

That as a proximate result of said negligence of the above-named defendants and each of them plaintiff has incurred doctor, hospital and medical expenses in the sum of \$936.13 to the present time, and will incur further medical expenses.

IV.

That plaintiff is of the age of 34 years with a life expectancy under the American standard mortality tables of 34.29 years; that plaintiff's ability to work and perform physical activities as a result of said negligence of the above defendants and each of them has been permanently impaired, and plaintiff will continue in the future to have pain and suffering.

The foregoing contentions of plaintiff and each of them are denied by defendants, who specifically deny that they were negligent in any particular charged or that any act or omission on their part constituted a proximate cause of plaintiff's injury and damage.

Issues to Be Determined

I.

Were defendants guilty of negligence in any particular as charged and, if so, was such negligence a proximate cause of plaintiff's injury and damage.

II.

What are the amounts of plaintiff's special and general damages.

Jury Trial

Plaintiff made timely request for trial by jury.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, listed on the attached sheets marked Exhibit "A" and "B," the parties agreeing, with the approval of the Court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

The parties hereto agree to the foregoing pretrial order and the Court being fully advised in the premises

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 14th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ NELS PETERSON,
Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendants.

EXHIBIT "A"

Plaintiff's Exhibits

- A. Series of photographs of scene of accident.
- B. 2 photographs of plaintiff.
- C. Deposition of M. L. Burr.
- D. Hospital records and X-rays of Albany General Hospital.
- E. Hospital records and X-rays of Good Samaritan Hospital.
- F. Hospital records and X-rays of Matson Memorial Hospital.
- G. Hospital records and X-rays of University of Oregon Tuberculosis Hospital.
- H. City of Albany ambulance service statements.

EXHIBIT "B"

Defendant's Exhibits

1. Deposition of Barbara Emily Renfro.
2. Deposition of Harry L. Sears.
3. Deposition of Dorothy S. Walker taken July 27, 1953.
4. Deposition of Dorothy S. Walker taken August 7, 1953.
5. Medical reports and records on plaintiff.

[Endorsed]: Filed February 14, 1955.

In the United States District Court
for the District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned judge of the above-entitled court on Wednesday, February 23, 1955. Plaintiff appeared in person and by Nels Peterson, one of her attorneys. Defendants appeared by John Gordon Gearin, one of their attorneys. A jury was

duly empaneled and sworn to try the case following which opening statements were made.

Evidence on behalf of all parties was introduced. The trial continued until the day following when, after both parties had rested, arguments to the jury were made and thereafter the court duly instructed the jury as to the law. The jury retired to deliberate and on the same day returned into open court its verdict in words and figures substantially as follows (formal parts omitted):

“We, the jury, duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of plaintiff, Dorothy S. Walker, and against defendants and assess plaintiff’s damages in the sum of \$1,500.00.”

Said verdict was duly received and filed and based thereon and the court being fully advised in the premises,

Now Orders that plaintiff have and recover judgment against defendants, and each of them, in the sum of \$1,500.00, together with costs and disbursements incurred herein taxed at \$100.69.

Dated at Portland, Oregon, this 24th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed February 28, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff, Dorothy S. Walker, and against the defendants, West Coast Fast Freight, Inc., a corporation, and M. L. Burr, and each of them, and assess plaintiff's damages in the sum of \$1,500.00.

Dated this 24th day of February, 1955.

/s/ MARION I. GREEN,
Foreman.

[Endorsed]: Filed February 24, 1955.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now plaintiff and moves the court for an order setting aside the judgment order heretofore made and entered in the above-entitled cause and granting a new trial to the plaintiff upon the question of damages only on the ground and for the reason that errors at law were committed in the trial of said cause which prevented the plaintiff from having a fair trial and which substantially affected the verdict in said cause. That the errors at law were as follows, to wit:

1. In advising counsel for the plaintiff during opening statement that said counsel's reference to pain and difficulties from pregnancy and childbirth of the plaintiff subsequent to the injuries complained of should not have been referred to and were not admissible upon trial, without objection made by counsel for defendants. Plaintiff contends that such facts were admissible under the pretrial order and the issues in the case.

2. In refusing to permit plaintiff to prove by expert medical testimony the effects of the injuries to her lower back, known to medical science as lumbo-sacral sprain, and displacement of her coccyx.

3. In refusing to permit plaintiff to testify as to the effects in the nature of pain and suffering and the difficulties of pregnancy and childbirth, arising from the injuries complained of.

4. In rejecting plaintiff's offer of proof in respect to the foregoing.

5. In failing and neglecting to give plaintiff's requested instruction contained in plaintiff's requested instruction No. 8 as follows:

“If you find that plaintiff's injuries are permanent, then you will take into consideration plaintiff's life expectancy.

“You are instructed that under the Standard American Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not.

“You will also take into consideration whether plaintiff's injuries, if any, permanently impaired her ability to work and perform physical activities.”

6. Misconduct of the jury in failing and neglecting to follow the court's instructions in respect to assessing general damages to the plaintiff, and in assessing an inadequate sum for plaintiff's injury and damages as shown by the evidence in the case.

7. Inadequacy of the verdict.

Plaintiff respectfully contends that the foregoing statements, rulings and orders of the court

constitute errors at law and the failure of the jury to follow the court's instructions in respect to damages and in assessing an inadequate sum of money to the plaintiff as damages, were prejudicial and prevented the plaintiff from having a fair trial.

That the foregoing assignments of error are reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

That plaintiff presents the foregoing motions for a new trial pursuant to Rule 59, Rules of Civil Procedure and will rely upon the following authorities:

15 Am. Jur., Section 78;

Nevila vs. Ironwood, 232 Mich 316;

50 A. L. R. 1189;

Hively vs. Higgs, 120 Or. 588;

53 A. L. R. 1052;

15 Am. Jur., Section 82;

Beals vs. Quigg, 11 P. 2d 354 (Ariz. 1932);

Bucktrob vs. Partridge, 265 P. 768
(Okla. 1928);

106 A. L. R. 874 [Citing Towel vs. St.
Joseph (Mo. 1916)];

Robin vs. Bartlett, 64 N. H. 426;

Samuels vs. Calif. St. Cable Co.,
124 Cal. 294;

- Tredwell vs. Whittier, 80 Cal. 574;
Denver Ry. vs. Harris,
122 U. S. 597, 7 S. St. 1286;
Jordan vs. Great Western Motorways,
2 Pac. 2d 786 (Cal. 1931);
102 A. L. R. 1516;
Shaw vs. Pacific Supply Company,
113 Pac. 2d 627;
Westfall vs. Kern,
43 Pac. 2d 392 (Col. 1935);
Safeway Cab Service Co. vs. Minor,
70 Pac. 2d 76 (Okla. 1937);
Sporable vs. Thomas,
33 Pac. 2d 721 (Kans. 1934);
Foster vs. Hudson,
92 P. 2d 959 (Cal. 1939);
Aune vs. Oregon Trunk Ry.,
51 P. 2d 663 (Ore. 1935);
Fuermbeck vs. Hanson,
75 P. 2d 1027 (Utah 1938);
Vowels vs. Missouri P. R. Co., 320 Mo. 34;
Pollock vs. Ham, 177 Ark. 348 (1928);
Hutches vs. Renfrow, 200 F. 2d 337 (CA5);
Zellem vs. Herring.
102 F. Supp. 105 (DC PA);
Caldwell vs. Southern Pacific Co.,
71 F. Supp. 955 (DC Cal);

Spero-Nelson vs. Brown,
175 F. 2d 86 (CA 6)

Snyder vs. Portland Traction Co.,
182 Or. 344, 185 P. 2d 563;

Frangos vs. Edmunds,
179 Or. 577, 173 P. 2d 596.

/s/ NELS PETERSON,

/s/ FRANK H. POZZI,

/s/ BERKELEY LENT,

Attorneys for Plaintiff.

Affidavit of Mail attached.

[Endorsed]: Filed March 7, 1955.

In the United States District Court
for the District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Cor-
poration, and M. L. BURR,

Defendants.

ORDER

Plaintiff's motion for new trial came on regularly for hearing before the undersigned judge of the above-entitled court on Monday, March 21, 1955, plaintiff appearing by Nels Peterson, of her attorneys. and defendants appearing by John Gordon

Gearin, of their attorneys. The court having heard argument and being fully advised in the premises and of the opinion that the motion is not well founded and for good cause shown,

Now Orders that plaintiff's motion for new trial be and the same hereby is denied.

Dated at Portland, Oregon, this 21st day of March, 1955.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dorothy S. Walker, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 24th day of February, 1955, and from the whole thereof.

Dated this 11th day of April, 1955.

PETERSON & POZZI &
BURTON J. FALLGREN,

By /s/ NELS PETERSON,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, Dorothy S. Walker, plaintiff in the above-entitled suit appeals to the U. S. Court of Appeals, Ninth Circuit, from a judgment entered in the U. S. District Court for the District of Oregon on the 24th day of February, 1955, in favor of the Defendants in said action and against said Plaintiff and from the whole thereof.

Now, Therefore, in consideration of the premises, and of such appeal, we, Dorothy S. Walker, as Principal, and the Maryland Casualty Company, a Corporation organized under the laws of the State of Maryland, and duly authorized to transact an surety business in the State of Oregon, as surety, do hereby jointly and severally undertake and promise on the part of the said Plaintiff and Appellant, the said Dorothy S. Walker, that said appellant will pay all court costs and disbursements which may be awarded against her on said appeal.

Dated this 7th day of April, 1955.

/s/ DOROTHY S. WALKER,
Principal.

MARYLAND CASUALTY
COMPANY,

[Seal] By /s/ KATHLEEN BROPHY,
Attorney-in-Fact.

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

ORDER

Based upon the records and files in this case, and the motion of plaintiff, appearing by and through her attorneys, it is hereby

Ordered and Considered that the Clerk of this Court be, and he is hereby directed to, forward with the record on appeal the exhibits in this cause to the Clerk of the United States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Portland, Oregon, this 12th day of April, 1955.

/s/ GUS J. SOLOMON,

United States District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, John Gordon Gearin, being first duly sworn, depose and say: That I am one of attorneys for defendants in the above action; that I have been in charge of the case insofar as the defendants are concerned since its inception; that at no time did

I have any knowledge that plaintiff sustained or was going to claim an impairment of the child bearing functions or difficulties in child bearing until plaintiff's attorney first attempted to advise the jury of such claim at the time of trial.

/s/ JOHN GORDON GEARIN.

Subscribed and sworn to before me this 21st day of March, 1955.

[Seal] /s/ NOELLE BURTON,
Notary Public for Oregon.

My commission expires March 10, 1956.

Service of Copy acknowledged.

[Endorsed]: Filed April 13, 1955.

United States District Court
District of Oregon
Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

February 23, 1955, 10:00 A.M.

Before: Honorable Gus J. Solomon, District Judge,
With a Jury.

Appearances:

NELS PETERSON,

Of Attorneys for Plaintiff;

JOHN GORDON GEARIN, and

JAMES BJORGE,

Of Attorneys for Defendants.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

(The jury having been duly empaneled and sworn, the following proceedings were had:)

Mr. Peterson: Could I ask leave of the Court in my opening statement to refer to two exhibits that have not been marked? They were marked at the time of the pre-trial, your Honor. I have shown them to counsel.

The Court: Is there any objection?

Mr. Gearin: No, your Honor.

Mr. Peterson: May it please the Court, counsel, ladies and gentlemen of the jury:

I assume that you have sat, every one of you, on juries before so that you understand generally your duties and the procedure in court in trying these civil actions. My name is Nels Peterson. I am the attorney who represents the plaintiff in this case who is Dorothy S. Walker. This is an action brought against West Coast Fast Freight, Incorporated, which is a corporation and operates a truck line in Portland, within the State of Oregon,

and elsewhere. I assume that you all understand that an opening statement is for the purpose of trying to outline your client's case to you so that you may follow the evidence.

I want to say to you that anything I say in this opening statement or the argument is not evidence. The matters that you determine in this case must be based upon the evidence, and what an attorney says—and that is both true of myself and Mr. Gearin—is not evidence.

Dorothy Walker is thirty-five years of age. She went to Toledo High School down in Toledo, Oregon, in Lincoln [1-A*] County. She and her husband, Gilbert Walker, who sits back in the back of the courtroom, were married there in 1937. Mr. Walker has been a logging truck driver, and in the 40's Mr. and Mrs. Walker owned some logging trucks in Toledo. Mr. Walker's principal business has been that of a logging truck driver and owner.

In 1949, I think it was, Mrs. Walker had a recurrent or constant temperature. She lost some weight. She became concerned about her condition, and it was finally diagnosed as tuberculosis of the lungs. I assume that you generally know about that. It is a common disease due to a germ. A person is hospitalized for it in one of the state institutions, may be hospitalized there and receive treatment, and that is what Dorothy Walker did. She entered a state tuberculosis hospital. I think she was there for some period of time. In, I believe it was in 1951 that she was admitted and received

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

treatment. While she was there in the Oregon State Tuberculosis Hospital she became acquainted with a girl whose name is Emily Renfro, who at that time was named Emily Renfro. Miss Renfro, I think, had been in that institution for four and a half years as a tuberculosis patient. In 1953, I think the date was April 27, 1953, Emily Renfro was released from the tuberculosis hospital, discharged from the hospital as an arrested tuberculosis case. Now, Mrs. Walker had been released sometime prior to that as an arrested tuberculosis patient, and by arrested I mean to say, as I understand it, [1-B] the disease, the germ becomes latent and so that it is not communicable to other people, and it is what they refer to as arrested tuberculosis.

On May 3rd or May 2nd, actually, Mrs. Walker and Emily Renfro left Newport, Oregon, which is in Lincoln County, to drive back to Portland. Now, as I remember it, as I recall, it was on a Saturday night. Mrs. Walker was driving a 1949 Buick car. In order to come back to Portland, she drove inland, that is to say, she did not take the Coast Highway. She drove inland and drove to Albany on Highway 99E, which is a highway which runs in a generally northerly and southerly direction. I assume that most of you are familiar with that highway.

Approximately five miles north of Albany, Oregon, is a juncture of highways known as Jefferson Junction or the Jefferson Cloverleaf. The highway at this point is relatively straight except there is

a rather wide curve in it. There is no bridge, but there is sort of a circle of the Jefferson Highway, and there is this Junction.

Mrs. Walker was driving north on Highway 99E with Emily Renfro sitting alongside of her in the front seat. So that you might better follow the evidence in this case, there has been taken two aerial photographs of the highway that is involved in this case. The point of the highway that is involved in this case, referring first to the one which is the one showing the longest view of the highway, you can see in this aerial photograph—the light is not too good here, but I assume you can all see it—this is looking north-south. When you are looking at this picture you are looking in a general northerly direction. Now, that is the direction that Dorothy Walker was driving the car. Here is this circle that I referred to. This is what is called Jefferson Junction or the Jefferson Cloverleaf. This direction is east; this direction would be west (indicating). If you could see that far enough, you would see Salem. You cannot quite see it in here, but this is south of Salem, being about five miles north of Albany. After this cloverleaf here there are two highways or two methods of getting onto Highway 99E. The one that you are particularly concerned with here is this one which goes off to the east, to the right-hand side of the highway (indicating).

Now, showing it a little bit closer, this is the same highway, and this is looking in an easterly direction so that you see here, and this direction would be north, and this direction would be south.

This direction is east, and the intersection that I referred to is this one right here where the highway goes out this way, and I believe Jefferson proper is out here, I am not sure. It is called Jefferson Junction.

Dorothy Walker in driving along here was driving here (indicating). The accident that we are concerned with occurred right about at this point, and I am referring to the [1-D] point that is, well, some distance north of where the east highway, the Jefferson Highway runs into 99E. I believe they had made a stop in Albany, but I am not sure of that. In any event, as they were driving along Emily Renfro was turning, or turned the dial on the radio and made some remark to Mrs. Walker as to the time, and Mrs. Walker's time was faster than hers, and so she was turning on the radio to change to a different station, and she said, "Well, it is one o'clock in the morning. We will get the correct time in just a minute." Now, that was just a few moments. I don't mean minutes; I mean moments, intervals of time, very shortly before this accident happened. Dorothy Walker was driving along the highway going forty-five to fifty miles an hour, coming along this relatively straight stretch of highway at night. She had her lights on. The condition of the weather was reasonable good. As she came, she approached this intersection—as she came down this highway she saw some distance away, and I am not sure whether she could estimate the exact distance, but she saw four headlights approaching as though she was meeting two cars,

and she saw these four headlights, and they appeared to be one alongside of the other. She assumed that there was one car passing another car. It looked like they had plenty of time, or the car that was attempting to pass had plenty of time to get around. It looked to her like that, and she continued to drive on, and I think took her foot off the accelerator, and finally, when she saw, when she got at this relatively close distance—I think it was two or three hundred feet, something like that, or less—she saw that it was a truck, a truck that did not have the clearance lights on it. The truck was coming up a slight—up a grade, and by referring to a truck I mean actually it is a tractor and two trailers, and I think that the over-all length of that truck is about 70 feet.

Mr. Gearin: Sixty, Mr. Peterson.

Mr. Peterson: Well, sixty. I have not measured it, 60 feet.

This truck was passing or in the act of passing a car, and when she got up so that she could see that it was a truck passing a car and there was no alternative for her to either hit head-on into the truck or go into the bank, as she looked up she saw the aluminum top of the truck with the words written on the front of it, "West Coast." She saw that just before she turned off of the highway. When she saw what was going to happen or when she saw what the condition was she made a remark like "My God, Em,—" that means Emily—"it is a truck, and we can't get by." So the next thing

she did was to turn off of the highway, and in turning off of the highway she went down the bank.

As it turned out, she did not—the car did not overturn, but she headed straight down the bank. As soon as she got over the bank the front door on the right came [1-F] open, and Emily Renfro was thrown out of the car. The car went down this rather steep bank head first and came down to the bottom of the ditch.

Mrs. Walker remembers going down the bank, and the next thing she did remember she was in the front seat, and her legs were up in the air, and she had been unconscious. It was at night, and neither the truck nor the other car had stopped. She did not know how long it was before she became conscious. When she became conscious she called out to Emily, and after so long a time Emily answered her. Emily was up some way, somewhere upon the bank. It was dark, and no one was around.

Finally, Mrs. Walker got out of the front seat of the car. She had asked Emily if she was hurt, and Emily said, “Yes, I think my back is broken,” or something like that, something to that effect. Mrs. Walker said, “Lie where you are.” Mrs. Walker was unable to walk herself when she got out of the car but started to crawl up the bank. She managed to get up to the level of the highway, and she does not know how long it was, but it was around two o’clock when a passing motorist saw the car headlights on and stopped. When he saw what had happened an ambulance was called, the state police, and she and Emily were taken into

the Albany General Hospital by ambulance. They were kept there for that day. It became known that Mrs. Walker was an arrested tuberculosis patient. They referred her to the Matson Memorial Hospital [1-G] in Milwaukie. When she was in the hospital at Milwaukie, she had had some lucid intervals, she became conscious and unconscious several times. She was unable to walk, had pain in her back and right hip. Her chest was troubling her. She was spitting up a bloody sputum, or there was blood coming from the injury to her chest.

She was taken by ambulance on May 3rd, which was the same day, I think, late in the afternoon, to Matson Memorial Hospital in Milwaukie. She entered there for, I think, one or two days, and then was transferred to Good Samaritan Hospital in Portland. She came under the care of the regular attending physician who was Dr. John Tuhy who is a chest specialist. He called into consultation for the back and hip injuries Dr. Abele, his associate, who is a specialist, a bone specialist, who treated her for the back and for the hip injuries. Dr. Philip Selling who is a neurologist was called into consultation to treat her for the symptoms she had of concussion. She remained in the Good Samaritan Hospital, I think, until the latter part of May. She was sent home in a wheelchair.

The thing that caused her the most difficulty was her right hip and her back. She remained home for four or five days, and then she was sent to the Tuberculosis Hospital which is up on Marquam

Hill, and she stayed there for about six weeks. The purpose of sending her to the TB hospital was to attempt to follow this tuberculosis, because, as I understand [1-H] it, Dr. Tuhy suspected that this would cause the tuberculosis to revive and become communicable and that there might be some dissemination of the tuberculosis through a greater area of her lungs. She had had a pneumothorax, and, as I understand it, that it where they collapse the lung. She had had that before.

She remained in the Tuberculosis Hospital here in Portland for that six weeks. Then she was released on crutches, I think that is correct. In any event, she had difficulty with her back and with her right hip. She has continued under the care of those doctors that I have mentioned from that day until today.

This is what I understand from Dr. Tuhy is wrong with her. She had a bruise of the lung as evidenced by the bloody sputum and the other symptoms which she had which the doctors will explain to you. I think the doctor will testify in respect to the bruised lung that the doctor can now be relatively certain that there was no dissemination of tuberculosis so that her tuberculosis is relatively good. She is an arrested tuberculosis patient. The only thing that she had was the bruised lung, and there was no dissemination or serious aggravation of this tuberculosis of the lung she had, but Dr. Selling, as I understand, did a brain test on her by means of what is call an electroencephalogram. That is, as I understand it, an elec-

trical device that they run through the head, run an electrical [1-I] current through there, and if you have an abnormal condition or brain damage it shows up in the electroencephalogram; it was done on her, and he found what is called an abnormal electroencephalogram.

Mr. Gearin: Your Honor, I dislike to object, but I am reading the pre-trial order, and it does not show anything that Mr. Peterson has told us about. This is all strange to us. It was not until this morning that they were advised that she had been examined by Dr. Philip Selling. In fact, the deposition disclosed that she told us she had not been, other than by Dr. Tuhy. I object to it at this time.

The Court: He said brain concussion and brain damage. He alleged that.

Mr. Gearin: Very well, your Honor.

Mr. Peterson: As I understand it from Dr. Selling, she had what is called brain concussion and some brain damage as shown by this electroencephalogram and that, however, she has had a good improvement from it. She has recurrent headaches at the present time. The doctor thinks she will have those for several years to come but there eventually will be no permanent residual brain damage from that.

The most serious thing she has, as I understand it, Dr. Abele says there has been an injury to what is called the coccyx, which is the tail bone. The tail bone consists of several small vertebrae, and she has displaced that so that it is now crooked. It

is not in the right place, and it is [1-J] constantly painning her so the Dr. Abele thinks it should come out. He will put her in the hospital for a couple of weeks and surgically remove her coccyx, her tail bone.

That, as I understand it, he says she has a lumbosacral sprain which is a sprain of the low back.

Now, she has a thing which causes difficulty to her which, as I understand it, is a congenital anomaly of the spine. It is referred to as spina bifida occulta. As I understand that medical term, it means simply that there has been in her low back, she was born as some persons—I think the percentage is relatively high, 10 or 15 per cent of the people are born with some abnormality, that the spine does not develop quite as it should so that with this abnormality if you get sprain or strain with a structurally weak back like that, they have a lot of trouble with it, and it is difficult to treat. That is what Mrs. Walker has. As I understand it, you will see some X-rays and hear the doctors testify about it.

The doctor says after this coccyx is removed she must wear a corset or back support, and if she gets no relief from that, then a spinal fusion should be performed upon her. You will hear the doctor explain what a spinal fusion is. That is what this case is about as far as the injuries are concerned.

This action is brought against West Coast Fast Freight, Incorporated and against one M. L. Burr. Mr. Burr, [1-K] as I understand it, was a truck driver employed by West Coast Fast Freight. I

took Mr. Burr's deposition in Seattle, Washington, a year ago.

Mr. Gearin: I took his deposition.

Mr. Peterson: Yes, you did, and I was in attendance. We had your attorney there, and I was in attendance. I cross-examined him.

Mr. Gearin: That is right.

Mr. Peterson: The plaintiff's contentions in this case are largely one of violations of the statutory law in the State of Oregon, and I should tell you just in passing, explain what I understand the evidence is concerning operation of these large trucks.

The West Coasts Fast Freight has a station in Portland, Oregon, where they keep many of their large trucks. These trucks run in to various cities other than Portland. They run from Seattle, I think, to Portland; from Portland to various places. Now, when these trucks are operated, if it is just a relatively short run they are operated by one driver. If it is a long run, they have relief drivers. Under the statutory law of the State of Oregon, when a truck is being operated at night they have to have certain lights on them. The statute specifies what those lights should be, and the Court will explain that to you. They must have what are called clearance lights to indicate the width of the truck. They must have marker, side marker lamps to indicate whether [1-L] it is a truck. They must have certain reflectors reflecting an amber color so that when a truck is operating at night these, under the law, are required to be on the truck and trailer and to be lighted, and they are to be placed in such position

that they are not to be obscured by mud or dust or debris that comes from the wheels of the truck on these.

We will expect to show in this case that the truck that was involved has a—or the truck and trailers have a certain number, and we expect to show that this truck and trailer was checked out, I believe, at 10:57 or 10:47 but actually did not leave Portland, Oregon, until about 11:30; that it was bound for, I believe, a California point, I believe Oakland, California; that this truck was being operated by Mr. Burr and was headed in that direction. We expect to show that at that point at 1:00 o'clock in the morning on that morning that that truck was at the Jefferson Junction.

Now, I believe it was the position of the defendants here that they had no responsibility, were not at the scene of the accident. We will expect to prove that to you.

We charge the driver of the truck and this West Coast Fast Freight, too, with negligence first in driving and operating the truck without proper clearance lamps and reflectors as required by law, and, second, in passing another vehicle proceeding in the same direction as the motor truck when the left side of the highway was not clearly visible [1-M] and free of oncoming traffic for a sufficient distance ahead to permit said truck to overtake and pass said automobile in safety.

The next charge of negligence we make is in driving said truck to the left side of the center line—center of the highway upon the crest of a grade and

upon the curve of the highway where the driver's view along the highway was obstructed within a distance of 500 feet.

Next we charge him with overtaking and passing another vehicle driving in the same direction as said truck at an intersection of highways when the same could not be done with safety.

Next, in failing and neglecting to keep and maintain a proper or any lookout for other vehicular traffic, and particularly for the automobile operated by this plaintiff.

Those contentions are denied by the defendants in this case.

You will see other photographs taken on May 3rd on the exact date of this accident by Mrs. Walker's son, Gary, who is seventeen. You will see hospital records and X-rays taken by these various physicians. You will hear the testimony of Mrs. Walker, her husband, Miss Emily Renfro who is now, whose name now is Mrs. Emily Batten. She has since been married.

One other point I do want to mention to you, that since the accident of May 3, 1953, Mrs. Walker has had a [1-N] child. She had a baby last October. The child is home. She had some considerable difficulty with the child as far as these injuries were concerned: nonetheless, the baby is alive and normal——

The Court: Mr. Peterson, this is the second or third time that you have gone beyond the pre-trial order. There is nothing in the pre-trial order about

spina bifida occulta aggravation, and now you are telling us about conditions with reference to the birth of a child. These are not in the pre-trial order. You have had plenty of opportunities to do it. You are not an inexperienced lawyer. I do not think that this should be done.

Mr. Peterson: Your Honor, in respect to the spina bifida occulta, as I understand it, the testimony of the doctor will be there is no aggravation of it, and in respect to the childbirth, counsel is aware of that. He has had her examined recently, and I believe it proper under the charge of pain and suffering.

The Court: Do not do it any more.

Mr. Peterson: Ladies and gentlemen, I hope that you will pay close attention to the evidence in this case and see that justice is done. Thank you.

Mr. Gearin: Ladies and gentlemen, Mr. Peterson has expressed a thought that perhaps you know what these cases are all about. I know that you have served on other cases before, and I know that some of you recall my trying cases [1-O] here before you not so long ago, and you know by this time that there are two sides to every case.

I merely want to say that we had no information concerning this alleged accident until sometime in the latter part of May when we received a letter from Mrs. Walker's attorneys, Kliks and Kliks.

Of course, you will understand from the nature of the charge that it is one of those charges that is difficult to disprove. Our testimony will be the testimony of Mr. Burr who no longer works for us, who

lives in Seattle and who is a representative of the Teamsters Union and cannot be here at the trial. His testimony will be before you. He will tell you under oath that he checked his lights before he left; that he was down somewhere in that vicinity sometime around the time that they say he was; that he did not crowd any car off the highway, and that he did not make what we call in trucking language a "bad pass."

In addition to that, we have the testimony of others who have some knowledge about it which, we believe will cast some doubt upon the plaintiff's story of what happened. First of all we will call as a witness Mr. Duane Lehr who at that time was the Marion County Deputy Sheriff. He will testify that he arrived at the scene of the accident when there was some people there; that he was coming up from a job, he had a side job that night; that he saw that there was something the matter. He stopped and talked to Miss Renfro, [1-P-Q] and he talked to the plaintiff. He will tell you about their condition. Suffice it to say, briefly, that his testimony will be that he asked Mrs. Walker what happened. She said, "A truck forced me off the road." He said, "Well, what kind of a truck was it?" She said, "It was a silver truck." "Well, don't you know anything else about what kind of a truck it was?" And, at that time she said she could not tell him what kind of a truck it was. He asked Miss Renfro what happened, and she told the Deputy Sheriff that she didn't know what happened.

Our next witness will be Mr. Walden Waddle who

was the tow truck operator. He will tell you the circumstances of his going down there, a Buick car that he had been advised had been wrecked so he brought his wrecker out there, and when he got to the scene of the accident he was down—we have some pictures not taken from the air but taken from the ground, and you can see the car went over somewhere along in here (indicating). The witness will tell you that when he got down there he saw the car, and the car had absolutely no damage to it; that he got in and drove it out to the other end where there was a ditch, and he had to put a cable across it to get it across the ditch, but the car was in drivable condition and could have been driven back to Albany. The reason he did not drive it back was because he was alone, and if he drove it back there would be no one to take his tow truck back so he just hitched it up. [1-R]

The next witness will be Mr. A. C. Payne, who operates a truck service at Eugene. Mr. Payne services, among other trucks, all the trucks of the West Coast Fast Freight that go north and go south, and they all stopped in there to be checked. In view of the charge made that we did not have any lights on the truck, Mr. Payne will testify he has checked his records for that twenty-four hour period, and there were no West Coast Fast Freight trucks that came in there and required any work done on their lights.

Our next witness will be Mr. William T. Ewing, who at that time, at the time of the accident, was a member of the State Police force, and he investi-

lives in Seattle and who is a representative of the Teamsters Union and cannot be here at the trial. His testimony will be before you. He will tell you under oath that he checked his lights before he left; that he was down somewhere in that vicinity sometime around the time that they say he was; that he did not crowd any car off the highway, and that he did not make what we call in trucking language a "bad pass."

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Our next witness will be Mr. William T. Ewing, who at that time, at the time of the accident, was a member of the State Police force, and he investi-

(Testimony of Dorothy S. Walker.)

home and returned in February of 1952 and stayed until April. I again left the Salem Hospital and was under private treatment by Dr. John Tuhy for approximately one year.

Q. Mrs. Walker, did I understand the latest that you were released from the tuberculosis hospital was what month of what year? A. April of 1952.

Q. 1952. Now, again on May 2, 1953, were you driving a 1949 Buick automobile? A. I was.

Q. What was your destination?

A. Portland.

Q. Where had you left from?

A. I had left my sister's home in Siletz, Oregon.

Q. Where is Siletz, Oregon?

A. Well, it is near Newport.

Q. Was anyone in the car with you?

A. Yes, Emily Renfro.

Q. How did you become acquainted with Emily Renfro? [3]

A. Emily and I were roommates in the TB hospital.

Q. What was the purpose of her accompanying you in the car?

A. Well, she had just gotten out of the hospital after nine continuous years in different TB hospitals, and she had not been anywhere for a long time, and I asked her if she would like to ride down with me and visit my sister, and she said yes, and we went.

Q. Did your sister live in Portland, Oregon?

A. No, in Siletz.

(Testimony of Dorothy S. Walker.)

Q. Then what was your destination in Portland, Oregon? A. My home.

Q. After leaving Siletz——

A. I was coming home.

Q. What course did you follow after you left Siletz?

A. We started up what is called the River Road toward Kernville, and I had left my pocketbook in Newport, had forgotten it in Newport, so when we got to Kernville we turned back down the Coast to pick up my purse. On the Coast it was rainy and drizzly, and Mrs. Renfro was nervous about the Cape and the highway so I told her I did not have to go back that way, it was just as close to go through Albany and Salem and into Portland that way if she felt any better, so that is what we did. We went back, got my purse left directly from Newport to Portland. [4]

Q. In coming from Newport what was the first towns that you came to of any size after leaving Newport? A. That would be Toledo.

Q. Then from Toledo to Corvallis?

A. Yes.

Q. Then the next town was Albany?

A. Yes.

Q. At any of these towns did you make any stops? A. I stopped in Albany.

Q. Mrs. Walker, approximately what time was it when you stopped at Albany, Oregon?

A. Oh, probably, maybe twenty-five to one. We had some coffee, and I think it must have been

(Testimony of Dorothy S. Walker.)

around a quarter of one until, when we left Albany.

Q. Would you tell the jury what happened, in your own words, after you left Albany, Oregon?

A. We were driving north toward Portland between Albany and Salem, and I was driving, I think, approximately forty-five to fifty miles an hour. I don't look at the speedometer. I couldn't be too positive. As we came around the top of this curve, and it is an incline that goes down and across this overpass and detour, a built up junction sort of thing, I saw two headlights, two sets of headlights approaching, and they seemed to be even with each other, and I assumed it was one car passing another car. There would have been plenty of time had it of been two cars. I slowed down a little like you do, automatically, [5] to make sure there was plenty of room, and as I got closer I realized that the one set of headlights were not gaining very much on the other set. I started slowing a little more, in fact at that time quite rapidly, and then as we approached these two sets of headlights I saw, approximately, maybe 100 feet away, I saw that it was a truck towing a trailer. The trailer was silver, and the truck was red, and just as we got to it I said something to Mrs. Renfro that we couldn't are not going to get—that the truck was partially past the other car, he would not have anywhere to go either crowding him over but to stay in our lane. I don't remember what I said to her just at this time, something to the effect that it was a truck and that we were

(Testimony of Dorothy S. Walker.)

going over, and just as we got to it where I had to turn abruptly out of the way I distinctly saw written across the top of this truck in red writing—across the top of the trailer, I mean, not the truck itself—“West Coast.” They are distinctive trucks, and they are very plain, and I saw it, and then we went over the bank. It was either go over the bank or hit the truck head-on.

Q. When you went off from the bank, did your car go down? A. Yes.

Q. Approximately how far down did you go?

A. I could estimate approximately 50 feet. I am not very good at judging distance, but I would estimate that.

Q. Have you been back to the scene of the accident since it [6] occurred?

A. I have driven past there one time recently.

Q. Do you know what happened to Emily?

A. At the time of the accident?

Q. Yes.

A. Yes, Emily was either thrown or jumped from the car, I don't know which, as we went over the bank, and she apparently rolled to the bottom because she was at the bottom when I called to her and she answered me.

Q. What is the next thing that you remember after you went over the bank?

A. Well, the next thing I remember is coming to in the bottom of the car, and I had been coughing blood and had vomited some. It was all over me, and I noticed that Emily, realized, of course, that

(Testimony of Dorothy S. Walker.)

Emily was not in the car, and I called to her, and she did not answer. I dragged myself out of the car and called to her more loudly, and she answered over in the distance. I asked her if she was injured, and she said——

Mr. Gearin: We object to any conversation, your Honor, as being hearsay.

The Court: Objection sustained.

Q. (By Mr. Peterson): Do you know the interval of time that you were unconscious?

A. No, Mr. Peterson, I don't. I could estimate the time [7] by the time we know we went over and the time that we were found.

Q. All right, how do you fix the time that you went over, if you can?

A. I know what time it was when we left Albany, and we were wondering about what time we would get home, and Mrs. Renfro had said that she had a certain time on her watch, and mine was a little different, and she said, "Well, I will turn on the radio. It is just a few minutes to one, and we will get the correct time at one o'clock." And she was in the process of tinkering with the radio just before the accident.

Q. What was the interval of time then until anyone came to help, if they did?

A. I think about an hour.

Q. What did you do in that interval?

A. Well, after I became conscious and got out of the car and called Mrs. Renfro, I started to crawl up the bank, and I would get a little ways, and then

(Testimony of Dorothy S. Walker.)

I guess I lost consciousness again. I don't know. I know I have a recollection of starting two or three times to go up the bank, and I don't believe that I had quite gotten to the top when I understand it was a truck driver of another freight truck who saw our lights down below the hill, and, to my knowledge, he was the first person there.

Q. How long did you remain there at the scene of the accident before you were removed, if you were removed? [8]

A. I am not too sure about the exact amount of time that it would take someone to notify the ambulance and for it to get out there. I think we checked in the hospital at Albany around two-thirty.

Q. How did you get into the hospital?

A. By ambulance.

Q. Did you walk to the ambulance?

A. No, I did not.

Q. How were you put in the ambulance?

A. I was put on a stretcher.

Q. Do you know of your own personal knowledge whether that was employed also with Emily?

A. I am sure that it was.

Q. Do you recall talking with a Duane Lehr who has been referred to here as the Marion County Deputy Sheriff?

A. I recall talking to some gentlemen at that time. In fact, he may be the man who put a blanket under my head and kept my face out of the mud.

(Testimony of Dorothy S. Walker.)

That is the only one I can remember talking to, and he asked me what kind of a truck it was.

Mr. Gearin: We object to the conversation with an undisclosed individual, your Honor. She says she does not recall the officer.

The Court: Objection sustained.

Q. (By Mr. Peterson): Mrs. Walker, when you arrived at the [9] hospital in Albany would you tell the jury what treatment was given to you, if any treatment was given to you?

A. Yes, we had a shot of, I don't know, of some sort of pain killer, and we had always been told that if we were involved in an accident to be sure to notify the attending physician that we were tuberculosis patients. In fact, I had it written on my driver's license, and when they found out that we were tuberculosis patients they put us in a room all by ourselves maybe assuming that we were contagious, I don't know. Anyway, they didn't wash us, anything like that. They did give us shots and took care of my bleeding lung, immediately brought me a pan and thinks like that, and then they had us notify the tuberculosis hospital which was at Matson Memorial, Milwaukie, to send an ambulance, after us.

Q. Mrs. Walker, at the Albany Hospital were any X-rays taken of you?

A. I think one or two.

Q. Do you know what portion of your body was X-rayed?

(Testimony of Dorothy S. Walker.)

A. I believe my neck and, I think, my lower back.

Q. What symptoms of pain or distress did you have from the time—or immediately after the accident when you became conscious and while you were in the hospital?

A. I had—of course, my head was aching, and I had what they called muscular spasm, extremely tight muscular spasm in the back of my neck, and my back hurt and my legs hurt. I was more concerned at that time about coughing blood. I [10] was concerned because of my TB more than anything, and my chest was quite painful.

Q. Did you cough blood constantly, or did you cough it frequently?

A. Frequently.

Q. Was there any quantity of blood, or was it just colored sputum?

A. No, red blood.

Q. How long did you cough blood immediately following the accident?

A. You mean how long did it reoccur?

Q. Yes.

A. Well, all the time I was in Good Samaritan Hospital. I would presume about a month.

Q. How long did you remain in the Matson Memorial Hospital?

A. Just overnight at Matson Memorial.

Q. Were any X-rays taken of you at Matson?

A. Yes, they were.

Q. Do you know what parts of the anatomy?

A. My hip, pelvis area, and, of course, my chest.

Q. Then where were you taken?

(Testimony of Dorothy S. Walker.)

A. To Good Samaritan Hospital.

Q. About when was it that you arrived in Good Samaritan?

A. I would say the 4th of May.

Q. How long did you remain in Good Samaritan Hospital?

A. Something like about two and a half weeks. I could [11] look it up, but I believe it was about two and a half to three weeks.

Q. Mrs. Walker, during the time that you were in the Good Samaritan Hospital could you tell the jury for us what doctor or doctors cared for you?

A. Dr. John Abele and also Dr. John Tuhy.

Q. Who was the first doctor who saw you at the Albany General Hospital?

A. I thing his name is Dr. Bain.

Q. Who was the doctor who first saw you at Matson Memorial Hospital? A. Dr. Tuhy.

Q. Who was the doctor who saw you first at the Good Samaritan? A. Dr. John Abele.

Q. What treatment was given you at the Good Samaritan Hospital for your injuries?

A. I was put in traction, head and neck.

Q. How long did you remain in traction?

A. Practically all the time I was in the hospital, about two and a half weeks.

Q. Was any other treatment given to you in respect to any other injuries?

A. Drugs for pain.

(Testimony of Dorothy S. Walker.)

Q. Were any casts applied to your body or bandages? A. No. [12]

Q. Would you tell the jury what troubled, what hurt you the most while you were in the Good Samaritan Hospital?

A. Well, my hip and lower back area were the most painful by far.

Q. Mrs. Walker, were you given any treatment for your back or hip?

A. That is what the traction was for.

Q. I see, I thought—was it neck traction?

A. Neck, hip, and back; neck and leg both.

Q. Did that improve your condition any?

A. Well, it eased it, yes.

Q. Did you continue to have any headaches?

A. Well, I still had headaches.

Q. Did you have any dizziness?

A. Yes, dizziness and fainting, oh, for quite some time following the accident. In fact, I still have slight dizziness if I rise too quickly, something like that.

Q. Mrs. Walker, when were you discharged from Good Samaritan Hospital?

A. The latter part of May.

Q. Were you able to walk at that time?

A. No, I was in a wheelchair.

Q. Why couldn't you walk?

A. Because my back and hip, my hip would not support me.

Q. What was the next hospital that you entered?

(Testimony of Dorothy S. Walker.)

advised by someone that these pictures were taken the date and hours that you have mentioned?

A. Well, yes, Gary told me they were.

Mr. Gearin: We have no objection other than to 1-G, your Honor. I-G has not been sufficiently identified. I do not know what it represents or what it is. We have no objection to the others.

The Court: All the exhibits except 1-G are admitted.

(Photographs previously marked Plaintiff's Exhibits 1-A, B, C, D, E, F, H, I and J were thereupon received in evidence.)

Mr. Peterson: We will offer in evidence, your Honor, the two aerial photographs.

The Court: Is there any objection?

Mr. Gearin: No objection, your Honor.

The Court: They may be admitted.

(Aerial photographs marked Plaintiff's Exhibits 11 and 12 for identification and received in evidence.)

(Discussion off the record.)

(Statements of City of Albany Ambulance Service, May 3, 1953, marked Plaintiff's Exhibit 8 for identification and presented [16] to the witness.)

The Court: What are they?

Mr. Peterson: Those are statements of the Albany Ambulance Service showing that she was picked up by ambulance on May 3rd.

(Testimony of Dorothy S. Walker.)

Mr. Gearin: No, your Honor.

The Court: They may be admitted.

(Documents previously marked Plaintiff's Exhibit 8 for identification received in evidence.)

Mr. Peterson: You may take the witness.

Cross-Examination

By Mr. Gearin:

Q. Mrs. Walker, you have been a plaintiff in damage cases before; have you not?

A. You mean have I been to court?

Q. Yes, seeking damages?

A. No, I have never been in court seeking a damage of the court.

Q. Did you or did you not together with your husband bring action against the C. D. Johnson Lumber Company?

A. Oh, I did not—on a truck that went through a trestle.

Q. You also filed an action against Jake's Restaurant?

A. Yes, but it did not come to court.

Q. I understand some disposition was made of that case? [17]

A. That is right.

Q. When were you married to Mr. Walker?

A. January 4, 1937.

Q. As I understand, you have been divorced a couple of times since?

A. That is right.

(Testimony of Dorothy S. Walker.)

Q. Are you presently married to Mr. Walker?

A. I am.

Q. You went to the sanitarium, as I understand it, in December, 1951, but you have not worked since October of 1951; is that a fair statement?

A. Yes, I would think so. Well, no, sir, I will modify that. I did do a little work in an office here in town.

Q. I was referring to the disposition which you got in your case against the Jake's Crawfish people on July 27, 1953. You were represented by Mr. Peterson in that lawsuit, were you?

A. Yes, I was.

Q. I was referring to page 6, Mr. Peterson, deposition taken by Mr. Williamson when you were in attendance. Question: "That is outside of home—"

Mr. Peterson: Just a minute. Your Honor, I have not had any notice of that. This is not marked as a pre-trial exhibit.

Mr. Gearin: I told you on Monday that I was going to use it. You said you had no objection to it. [18]

Mr. Peterson: You said to me you were going to introduce the complaint in evidence. I said, "I will have no objection to the complaint being introduced in evidence." You said nothing at all about any deposition.

The Court: Why was it not marked as an exhibit here? You could have done that very easily?

Mr. Gearin: That is correct, your Honor. I went over these with Mr. Peterson on Monday. He told

(Testimony of Dorothy S. Walker.)

me about the aerial photographs. I said, "That is fine, anything you want, and anything you want to have identified, fine." He said, "We will do it at the time of the trial," and I told him what I was going to have here.

The Court: Is that right, Mr. Peterson?

Mr. Peterson: Your Honor, I submit I told him I would have the two aerial photographs he had not seen.

The Court: Did you have the two aerial photographs marked as an exhibit?

Mr. Peterson: I did not, your Honor, because they were taken Saturday afternoon.

The Court: You may have those marked as an exhibit, and as long as you did not mark yours I am going to let him do the same thing.

Q. (By Mr. Gearin): I will ask you, at that time in the office of Peterson & Pozzi on July 27, 1953, 10:00 o'clock a.m., there being present Mr. Peterson representing you, [19] Mr. Wayne A. Williamson representing the defendant, if you were asked this question and you gave this answer:

"Q. That is outside the home. I am not concerned with housework but where you received compensation.

"A. I was with a logging business until I went to the sanitarium in December of 1951, but I did work on October of 1951. That is the last month I have done any work."

Did you so testify?

(Testimony of Dorothy S. Walker.)

A. That would be true up until that time; yes, sir.

Q. That was up until 1953?

A. What date in 1953?

Q. July 27, 1953? A. Yes, sir.

Q. Following the accident at Jake's, you had been treated by Dr. Tuhy and had been examined by an orthopedist; had you not?

A. That is right.

The Court: Are you mistaken about that date? That was July, 1953?

Mr. Gearin: The deposition was taken July 27, 1953, after the instant accident, your Honor.

The Court: This accident happened May 3, 1953?

Mr. Gearin: That is correct.

The Court: Proceed. [20]

Q. (By Mr. Gearin): Was your tuberculosis reactivated in this accident at Jake's?

A. I think not now. I did think so at the time.

Q. You were hospitalized after that, were you not? A. Very briefly.

Q. Did you sustain bruises and contusions to your body at that time in the fall at Jake's?

A. Yes, I did.

Q. Did you sustain fracture of the rib?

A. No, I don't think that the rib was definitely fractured. I understood that it was, but I believe that it was not.

Q. Did you sustain a severe tear and twisting and wrenching of the tendons, muscles, ligaments of

(Testimony of Dorothy S. Walker.)

your back? A. Yes, I did.

Q. Did you sustain injuries to nerves, muscles, organs, and soft tissues of your upper chest and aggravation of a previous lung condition resulting from tuberculosis?

A. No, I have just stated that I thought that my chest was hurt badly. As it turned out, it was not.

Q. These photographs, if I may see them, please, Mr. Bailiff.

(Photographs presented.)

Q. I am handing you the top photograph, Mrs. Walker, which is No. 1-B, and I will ask you if it is not a fact that your automobile left the highway just in the vicinity of the area shown in this sign, "Highway 99E"? [21] A. Yes.

Q. That shows where you went off the highway?

A. Yes.

Q. Did you attempt to drive onto the shoulder and keep your car on the shoulder of the highway in view of the oncoming vehicles?

A. This happened so quickly by the time I realized that it was a truck I couldn't say whether I stopped to think that there was room to get off on the shoulder or not. I know that I was on the shoulder until I see this signpost in my headlights and went over the bank. I didn't realize how large a sign it was or how small.

Q. Very well. Now, Mrs. Walker, when you stopped you say that you regained consciousness,

(Testimony of Dorothy S. Walker.)

and there was a freight truck up on the road. Was that a silver truck?

A. Oh, I don't know, I didn't see that truck.

Q. How did you know it was a truck?

A. I mean, it was down, I couldn't see it. I could see the lights. He had driven on down, pulled out on——

Q. Do you know if that was a L.A.-Seattle truck? A. Oh, I don't know.

Q. Do you know whether or not it was the same truck that crowded you off the highway?

A. If it was, it took him a long time to get down there because it was two o'clock—I assumed that it was not.

Q. You do not know definitely though whether it was or not, do you? [22]

A. I never saw the truck after I went over the bank.

Q. And so, as far as you know then, Mrs. Walker, the truck that stopped down there and the driver that came back might have been the truck that forced you off the road?

A. It might have been, but I don't know why he would waited an hour.

Q. What were the weather conditions that night?

A. It had been raining on toward the Coast, but to my best recollection it was dry. There was mud down in the ditch where we went, but I think the main surface of the highway was reasonably dry.

(Testimony of Dorothy S. Walker.)

Q. Was it cloudy?

A. I believe so. It was not foggy. It may have been cloudy.

Q. Were your headlights on high or low beam as you approached the area where your car left the highway?

A. Well, they were on high until I saw the two sets of headlights. Then I dimmed them. I always do.

Q. Were your lights on high or low when you say you saw the words "West Coast" on the truck?

A. To the best of my recollection, I flicked my headlights two or three times, thinking that perhaps whoever it was that was approaching was not aware that we were there. Now, exactly when we went over the bank I couldn't say. I assume they were on low.

Q. When you saw the words "West Coast" on the truck, as [23] you say, were your lights on high or low: would you know? A. I don't know.

Q. Would you know what a truck and trailer looks like? Do you know a semi?

A. Is that a semi truck trailer or tractor and trailer?

Q. Tractor and trailer. A. Yes, sir, I do.

Q. You have been in the truck business?

A. Not freight trucks, no.

Q. Log trucks? A. Yes.

Q. You know what a tractor is? A. Yes.

Q. You know what a semi trailer is?

(Testimony of Dorothy S. Walker.)

A. Yes.

Q. All right, now, was this a full truck; was it a tractor and trailer; was it a tractor and two trailers, or a set of doubles?

A. Oh, I don't know.

Q. Or a main box——?

A. I don't know because I did not see that. I did not have time enough. I saw it was a red truck with a silver van. Now, whether the van was stationary to the cab or whether it was on with a fifth wheel, well——

Q. Well now, the words "West Coast" whereabouts were they on the truck or tractor or main body or wherever it was that [24] you say you saw it? A. Up on the top of the silver van.

Q. That would be above the cab?

A. That is right.

Q. About how far above the ground would that be, Mrs. Walker?

A. Well, as I say, I am not familiar with freight trucks, so whatever their height is——

Q. Well, if I told you that the trucks generally are about 12 feet high, would that give you some idea how high this lettering was from the ground?

A. Yes, I am only estimating, you understand?

Q. Yes.

A. I would say it was probably some 6 inches to a foot below the top of the cab. That would be my estimation.

Q. You mean not cab but top of the truck?

(Testimony of Dorothy S. Walker.)

A. I mean top of the trailer, yes.

Q. Was that eliminated?

A. There was no lights on it. There were no lights, but the headlights on the truck were eliminated by my headlights, yes.

Q. Were the lights of this truck on bright or dim?

A. Well, I don't know. I believe that they were on dim. I am not sure.

Q. How fast was this oncoming truck going?

A. I could only estimate.

Q. Tell us your best estimate. [25]

A. I couldn't say for sure. I would say it seemed at that time forty-five to fifty miles an hour, probably fifty anyway.

Q. Your husband works for Consolidated Freightways; does he not?

A. That is right.

Q. When did he start working for Consolidated?

A. In the fall of 1952.

Q. Do you recall your deposition in this case, Mrs. Walker?

The Court: Give it to her.

(Deposition presented to the witness.)

The Witness: Yes, I recall that.

Q. (By Mr. Gearin): At that time you advised Mr. Young, my partner, that your husband did not work for a truck line in Oregon?

A. Well, I was not married to him at that time. He had never worked for a truck line when we were married before, in Oregon.

(Testimony of Dorothy S. Walker.)

Q. You received a settlement from your accident involving Jake's Crawfish?

A. Yes, a small settlement.

Q. Could you tell us how much that was?

A. I don't know how much the amount was because the doctor's fees, those were taken out of it. I think I received—I am guessing, I don't have the check—three hundred some dollars. [26]

Q. You do not know how much Mr. Peterson got?

A. I do not know how much the doctor's bills were now.

Q. Was there a center line on that highway at that time; do you recall?

A. We are speaking of 99E at Jefferson Junction?

Q. Well now, Mrs. Walker, you say that you have estimated the speed of this oncoming truck between forty-five to fifty. That was your estimate?

A. That is right.

Q. Would you turn to page 20 of your deposition, please. Refer, if you will please, to the fourth answer from the top.

A. Yes.

Q. And the next question you answered.

A. Yes.

Q. Do you see that?

A. Yes.

Q. When was it that you were first able to estimate the speed of the approaching truck?

A. Well, I don't know when. I would estimate it. I am estimating it simply by the amount of time

(Testimony of Dorothy S. Walker.)

it took us to come together. I didn't see how fast the truck was driving, and I felt I could only estimate——

Q. The reason I asked you that is because on August 7th when your deposition was taken you will agree with me, will you not, that at that time you could not estimate the speed of the truck? [27]

The Court: Read the question.

Mr. Gearin: "Q. Were you able to make any estimate of the speed of the approaching truck?

"A. No, I am afraid I couldn't do that."

The Witness: I told you now that I really couldn't. You asked me to estimate it. I did.

Q. All right, do you make a distinction between the word "estimate" and the word "guess," Mrs. Walker? A. Well, maybe I am guessing.

Q. Could you tell us about how far this truck was when you first noticed it being on the wrong side of the road?

A. I would again estimate and say about 500 feet.

Q. This truck that you saw down the roadway afterwards, did that have any clearance lights on it?

A. The only thing that I recall, when they were putting me on the stretcher I saw what I assumed was a freight truck covered with yellow lights parked down beyond where he had pulled out, and the man who first, to my recollection, first arrived told us that he was a truck driver; that he had seen

(Testimony of Dorothy S. Walker.)

our lights from his truck. He is the first person I remember being there.

Q. You have no recollection of going down the bank yourself, do you?

A. Yes, I recall going over the bank. I don't recall, I don't know whether, recall lighting or not. I think not.

Q. Do you know what kind of vehicle was being passed? [28]

A. No, I would not know for sure. I assume it was another car, but I wouldn't know.

Q. Do you know who was driving that car?

A. No, sir, I do not.

Q. Have you been informed as to the name of that individual?

A. I had been informed as to the name of an individual who was said to have been driving it. As it turned out, he was not driving it.

Q. What was the name of that individual?

Mr. Peterson: Objected to as immaterial, your Honor.

The Court: What do you claim for that?

Mr. Gearin: We have been trying to find out, your Honor. At the time the plaintiff's deposition was taken we asked the same question, and Mr. Peterson instructed his client not to give us that name. I have been trying to find out who it is. I would still like to know. I would like to make an independent investigation.

Mr. Peterson: Your Honor, I supplied counsel

(Testimony of Dorothy S. Walker.)

with the name of the person who stopped a car when it was going past, but that was another name.

The Court: The witness should have answered the question at the time it was propounded to her. Answer the question now.

The Witness: Yes, I was told that a Mr. Robinson was driving the car. After I talked to Mr. Robinson I realized he had not been—he had been mistaken. [29]

Q. (By Mr. Gearin): Did your car turn over as it went down the embankment?

A. I don't think so.

Q. You do not know, do you, Mrs. Walker?

A. No, I really don't know. I don't think so.

Q. You have never seen the car since?

A. I have not.

Q. You do not know of anyone who saw the accident or witnessed it other than yourself and Mrs. Renfro?

A. And the driver of the truck, I assume he must have seen it.

Q. You were an out-patient at the time of this accident; were you not?

A. I was and still am receiving what they call pneumothorax treatments which require me to get up on the hill once every ten days for air refills.

Q. You were undertaking that treatment at the time of this accident? A. Yes, sir.

Mr. Gearin: I have nothing further, your Honor.

(Testimony of Dorothy S. Walker.)

Redirect Examination

By Mr. Peterson:

Q. Mrs. Walker, I hand you what has been marked here as Plaintiff's Exhibit No. 1-D. I will ask you if there appears in that photograph a highway marker sign? A. Yes.

Q. I wonder if you would hold that up so that the members of the jury might see what you are referring to, and does that [30] appear in there as a white post? A. Yes.

Q. Would you tell the jury as you look in that photograph which direction are you facing?

A. This way you are facing south (indicating).

Q. You would be facing the same direction that you were then approaching?

A. No, I was driving north. I was coming this way (indicating).

Q. That is the person, when that picture was taken the camera would be faced——?

A. This would be north; this would be south (indicating).

Q. Where in relation to this post here did you drive your car off the highway?

A. Almost directly in front of it, 10 feet maybe.

Q. There appears to be some tracks on the photograph. Can you testify as to whether or not that is the position of your—or the location of where you drove the car off the highway?

(Testimony of Dorothy S. Walker.)

A. I know I went off directly in front of the signpost.

Mr. Peterson: May I hand this to the jury, your Honor.

The Court: Are you finished with this witness?

Mr. Peterson: No, I am not at the moment.

The Court: Wait until you finish.

Mr. Peterson: Very well.

The Court: Proceed. [31]

Q. (By Mr. Peterson): Mrs. Walker, handing you what has been marked as 1-B, which direction is that facing?

A. This is facing north. This would be north, and this would be south (indicating).

Mr. Peterson: In order that we might have something that the jury could see, would you have any objection if I would ask Mrs. Walker to make a mark on the photograph as to the position where the car was driven off from the highway?

Mr. Gearin: No.

Q. (By Mr. Peterson): I am handing you a lead pencil. Would you mark on the photograph, if you are able to, the position where you drove off from the highway.

A. It is not marked well, but I will try. (Witness marks on photograph.)

Q. Counsel, I cannot very readily see this. Why don't you take a pen.

The Court: Do that during the noon hour. She may mark it. Go ahead with your examination.

(Testimony of Dorothy S. Walker.)

Q. (By Mr. Peterson): Mrs. Walker, have you had a child since May 3, 1953?

A. Yes, I have.

Q. Did you have any difficulty during the pregnancy——

Mr. Gearin: Objection.

The Court: Objection sustained.

Q. (By Mr. Peterson): Mrs. Walker, in respect to the lettering which you saw on this truck, can you describe to [32] the jury whether that is black lettering, or can you describe it for us?

A. I don't know, but as I saw it that night in my headlights it was writing in a bar effect right across the top of the truck—or of the trailer, and the lettering was in red, and the trailer was silver. It said "West Coast." All I saw was the two words. If there were more than that I didn't see them. I don't think that there were any more because I saw it plainly. I think it just said "West Coast."

Mr. Peterson: No further questions.

Mr. Gearin: Nothing further.

(Witness excused.) [33]

EMILY RENFRO BATTEN

a witness called in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Mrs. Emily Batten?

A. Yes.

Q. Mrs. Batten, what is your husband's name?

A. George Batten.

Q. What is his occupation?

A. An accountant.

Q. Mrs. Batten, what was your name prior to your marriage and present married name?

A. Emily Renfro.

Q. Mrs. Batten, do you know Dorothy Walker who sits on my right here? A. Yes, I do.

Q. When did you first become acquainted with her?

Mr. Gearin: This is immaterial, your Honor.

The Court: She may answer.

The Witness: In December, 1951, I think it was.

Q. Did you continue your acquaintanceship after December, 1951? A. Yes, we did.

Q. Did you see Dorothy Walker in the latter part of April, or first part of May, 1953? [34]

A. Yes.

Q. When were you discharged, if you were, from any institution for the treatment of tuberculosis?

(Testimony of Emily Renfro Batten.)

A. Well, of course, it was quite dark. There were no lights or anything around, and I was on the ground, and how far down I don't have any idea.

Q. How long did you remain there?

A. Well, I couldn't say in time. When I first was aware of anything there was no noise or anything like that. Then on occasion I could hear Dorothy calling to me, and she was crying, and then one time she called quite loudly asking where I was and wanted to know if I was all right, and I said well, I thought that my——

Mr. Gearin: We object to conversations of Mrs. Batten.

The Court: Objection sustained.

Mr. Peterson: Will the Court permit showing expressions of pain?

The Court: Where?

Mr. Peterson: At the scene of the accident.

Mr. Gearin: We have no objection to that, your Honor.

The Court: Proceed.

Q. (By Mr. Peterson): Did Mrs. Walker, while you were lying there on the bank, make any expressions of pain or exclamations of pain?

A. Yes, she did.

Q. What were those exclamations or expressions of pain?

A. Well, she was doing a good deal of crying and moaning [37] and kept telling me to lie still and that she would try to get help for us.

(Testimony of Emily Renfro Batten.)

Q. Do you know how long you remained where you were?

A. No, I couldn't say. It seemed, of course, it seemed an awfully long time to me, but then I didn't have any idea.

Q. Did you see Mrs. Walker get out of the car?

A. No.

Q. Or did you hear any sound other than those that you have related as to voice?

A. No, other than I think perhaps I might have heard sounds of traffic above some place, but I didn't—nothing close to me.

Q. Do you know of your own knowledge what time it was when you were taken out of where you were?

A. No, the only next recollection of time I have is when they told us in the hospital that it was two-thirty or thereabouts.

Q. Did you have any conversation with any deputy sheriff from Marion County, Oregon, who identified himself as such?

A. No one ever identified themselves to me as being a sheriff or police officer of any kind at the scene of the accident.

Q. Did you have any period of unconsciousness after leaving the scene of the accident?

A. After leaving the scene of the accident?

Q. Yes. [38] A. No.

Q. Do you know of your own knowledge whether Dorothy Walker did?

(Testimony of Emily Renfro Batten.)

A. I never saw Dorothy until we were in the hospital waiting to be X-rayed, and then I didn't see her to talk to. I mean, she was in the same room with me or whatever it was——

Q. Do you know whether or not you came in the same ambulance to the Albany General Hospital?

A. I really don't know. I really couldn't say.

Q. Mrs. Renfro, how long did you stay in the Albany General Hospital?

A. We were removed at the same time.

Q. You were removed in the same ambulance?

A. Yes.

Q. You were taken to Matson Memorial Hospital? A. Yes.

Q. During the time that you were in the hospital at Albany General Hospital were you constantly in the presence of Dorothy Walker?

A. Yes.

Q. About what time of the day did you leave the Albany General Hospital?

A. Well, I believe it was sometime before noon, but I wouldn't swear to it. I couldn't say for sure the exact time of when we were removed.

Q. Did you stay in the Matson Memorial Hospital a longer period [39] of time than Dorothy Walker did?

A. Yes, I was there when they took her out.

Q. Then the next time you saw her was when?

A. It was quite some time later I went up to Good Samaritan, and I saw her.

Q. Mrs. Batten, have you seen her on several

(Testimony of Emily Renfro Batten.)

occasions since that time? A. Yes.

Q. Has she made any expressions of pain or discomfort to you. A. Yes, she has.

Q. What have those been?

A. Well, she has complained a number of times about her hip.

Q. Have you observed any change in her physical appearance between prior to this accident and since? A. Yes, I think she looks worse.

The Court: I cannot hear you.

The Witness: Yes, I think she—you mean over-all physical appearance like such as loss of weight and so forth and so on?

Mr. Peterson: Yes.

A. I believe she has lost considerable weight. At least, she appears to to me.

Q. Do you notice any change or difference in her walk or gait? A. Yes, I believe I do, yes.

Q. What is that difference? [40]

A. Well, there are times when she has quite a bit of pain in her hip and does quite a bit of limping.

Q. At any time in your presence has she fainted? A. Fainted?

Q. Yes.

A. Yes, I believe she has a couple of times.

Mr. Peterson: You may take the witness.

(Testimony of Emily Renfro Batten.)

Cross-Examination

By Mr. Gearin:

Q. I will ask you, Mrs. Batten, if at the scene of the accident you were asked this question and you made this response to Mr. Duane William Lehr: "What happened?"

Mr. Peterson: May I inquire as to whether or not there were any other persons present?

Mr. Gearin: There being present Mr. Lehr and yourself, and you were asked this question: "What happened?" You replied, "I don't know, it happened so fast." Did you tell Mr. Lehr that?

A. I don't recall anyone, I don't recall people asked me things like people will do when there has been an accident and some people around, and I did a little talking, I was so frightened, and I was having a good deal of pain in my back. I was also crying so that I am sure that I never answered anybody.

Q. Your testimony is that you did not make such a statement? A. That is right.

Q. You were not paying too much attention to the manner in [41] which Mrs. Walker was driving her automobile?

A. Well, I know that Mrs. Walker was driving in a very safe manner and not too fast.

The Court: You just answer the questions. When he asks you a question you answer it.

The Witness: Would you repeat the question, please?

(Testimony of Emily Renfro Batten.)

Q. (By Mr. Gearin): You stated that you were not paying attention. To what were you not paying attention, Mrs. Batten?

A. I was not paying attention to the surrounding area.

Q. Where was this truck that you saw when you first saw it?

A. When I first realized that it was a truck?

Q. That is right.

A. It was immediately before we went over this bank.

Q. In what lane, where was Mrs. Walker's car with reference to the center line of the highway at that time, if you know?

A. Oh, considerably over to the right of the line.

Q. How far was it from the right-hand edge of the pavement?

A. I am afraid I wouldn't know. I wouldn't be able to say.

Q. How fast was Mrs. Walker going?

A. At that particular time?

Q. Yes.

A. Probably going thirty-five miles on up to forty-five. She never drove over forty-five or fifty.

Q. How fast was the truck coming?

A. I don't know; I couldn't say.

Q. You were turning the radio on for music; were you not? [42]

A. Yes, and for time.

(Testimony of Emily Renfro Batten.)

Q. And as a matter of fact, all you saw was four lights across there?

A. Yes, well, yes, two pair of headlights.

Mr. Gearin: That is all.

Redirect Examination

By Mr. Peterson:

Q. Do you recognize anyone in this courtroom whose name has ever been referred to you as Duane Lehr? A. No.

Q. Did you ever hear the name, Duane Lehr before? A. No, not until it was asked.

Q. Do you recognize anyone in this courtroom who spoke to you on the morning of May 3rd, 1953, at the scene of the accident you have described?

A. No, not that are familiar.

Q. Did anyone identify themselves in any capacity either as a police officer or a law enforcement officer?

A. No, no one said to me that they were a law officer.

Q. When you arrived at the Albany General Hospital were you able to walk? A. No.

Q. Without going into any detail as to the nature of your injuries, were you in any pain or distress of a serious [45] nature while you were in the Albany General Hospital?

A. Yes, in my opinion, I was.

Q. Or at the scene of the accident after it occurred? A. Pardon?

(Testimony of Emily Renfro Batten.)

Q. Were you in any pain or discomfort or distress after the accident occurred and at the scene of the accident? A. Yes.

Mr. Peterson: No further questions.

Recross-Examination

By Mr. Gearin:

Q. Mrs. Batten, you were present at the scene of the accident when Mrs. Walker talked to the state police; were you not?

A. An officer talked to Mrs. Walker when we were in the hospital that I recall.

Q. Do you recall when your deposition was taken in this case, which is referred to as pre-trial Exhibit No. 1?

Page 13. I will ask you if at the time your deposition was taken in my office on February 9, 1954, there being present Mr. Peterson, Mrs. Walker, the plaintiff and Eleanor Pidgeon the court reporter, you were asked these questions and you gave these answers:

“Q. Miss Renfro, were you present at the scene of the accident when Mrs. Walker talked to the state police?

“A. I had to be present. I don't know [46] where she was when they arrived.

“Q. I mean, did you hear her talking to the state police officer? A. Oh, yes.

“Q. Did you hear her tell the state police what happened? A. Yes.”

(Testimony of Emily Renfro Batten.)

You so testified last year, didn't you?

A. This was at the hospital.

Q. I will ask you if at the same time that your deposition was taken you answered the question, you answered this question as follows:

"Q. And did she tell the state police the same thing at the hospital later on that morning?

"A. Yes, she did."

Did you so testify as appears in that deposition?

A. Well, apparently I did. It is in the deposition.

Mr. Gearin: I have nothing further, your Honor.

Redirect Examination

By Mr. Peterson:

Q. Mrs. Batten, what conversation did you hear between the police officer and Dorothy Walker?

Mr. Gearin: Objection. [47]

The Court: Objection overruled.

The Witness: You mean I can answer?

Mr. Peterson: Yes, you may answer.

The Witness: This, to me, was in the hospital. I mean, to my knowledge it was in the hospital and the police officer was talking to Mrs. Walker and asking her about the accident and asking her what it was and so forth and so on, and she said, "It was a truck, and if you hurry you can run it down." He asked her if she knew what kind of truck it was, and she said, "Yes," she said, "it was

(Testimony of Emily Renfro Batten.)

a West Coast truck, and it had no lights on it other than the headlights." And so they talked a little while. I don't recall any more of the conversation. Then he stepped back away from her. They were off to my right some place, and I saw him off to the foot of me, and he said to some other people, "I don't believe there was any truck involved at all, and I am not going to run it down," and that was the last I heard of that particular conversation.

Q. Do you recognize the person as being in the courtroom at the present time?

A. I couldn't identify anyone, I mean, other than that they were men.

Q. Were you then lying on a stretcher?

A. Yes, I was.

Q. Was Dorothy Walker also lying on a stretcher? [48]

A. Yes, she was.

Q. This conversation occurred—how far apart was your stretcher from hers?

A. Well, possibly the distance between this man and myself (indicating).

Q. Was this in a hospital room at the Albany General Hospital?

A. Well, it appeared to be like when you come off the elevator before you go—we were waiting for X-rays.

Q. Was there anyone else present at that time?

A. There seemed to be three or four people present.

Q. Do you know who they were?

(Testimony of Emily Renfro Batten.)

A. No, I do not.

Mr. Peterson: No further questions.

Recross-Examination

By Mr. Gearin:

Q. Do you recall definitely that Mrs. Walker told the state police officer in the hospital that it was a West Coast truck? A. Yes, she did.

Q. You recall that definitely?

A. Yes, she did.

Q. There is no question in your mind about that at all? A. I heard her say it.

Mr. Gearin: Thank you, that is all.

Mr. Peterson: That is all.

(Witness excused.) [49]

The Court: Ladies and gentlemen of the jury, as I have told you on previous occasions, please do not make up your minds as to how this case should be decided until you have heard all the testimony, the arguments of counsel, and the instructions of the Court. Prior to the time the case is submitted, under your oath, you are not to discuss this matter with anyone else, even among yourselves.

There are some witnesses for both sides in this courtroom. Please do not talk to anyone or any of them about anything, even matters not connected with this case. The jury is now excused until two o'clock this afternoon.

(Noon recess taken.) [50]

Afternoon Session, 2:00 P.M., Trial Resumed

Series of photographs marked Defendant's Exhibits 26A, B, C, D, and E for identification.

(Deposition of Dorothy Walker marked Defendant's Exhibit 24 for identification.)

JOHN F. ABELE

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

The Court: Are you an orthopedic surgeon, doctor?

The Witness: I am, sir.

The Court: Is there any question about this man's qualifications?

Mr. Gearin: No, your Honor.

The Court: The qualifications of Dr. Abele are admitted. It is stipulated that he is duly licensed to practice medicine in the State of Oregon; that he confines all his activities to the specialty of orthopedic surgery. Tell us what the field of orthopedic surgery is?

The Witness: The field of orthopedic surgery is that branch of medicine related to bone and joint structures and their allied structures such as tendons and muscles that cause the joints to function, or diseases, injuries.

The Court: Proceed [51]

(Testimony of John F. Abele.)

A. The findings did you wish, what did the findings consist of?

Q. What did your examination consist of?

A. Consist of?

Q. Yes.

A. Inspection and movement of the affected limbs that were painful to determine what the extent——

Q. Doctor, did the patient give you a history of injury? A. She did.

Q. What was that history?

A. The history was she the previous day was driving a car with a passenger and was driven off the road and overturned. I am not sure whether it was overturned or not. Anyway, there was a severe enough accident that she was jolted and thrown about in the car and knocked unconscious, momentarily dazed, and sufficient injuries to be taken to the hospital in the neighboring town of Albany. Because of her being a previous out-patient of Matson Memorial Tuberculous Hospital she was transferred to that institution.

From my examination briefly there with the X-rays that I saw, I felt that she was not in the proper institution for her best care of her injuries per se and it would be better to transfer her to a general hospital, which we did, took her to Good Samaritan Hospital and there were able to get more accurate X-ray studies as most of the X-rays that are done at the Matson Memorial are just films. Dr. Tuhy [54] consented to observe her as

(Testimony of John F. Abele.)

a patient in Good Samaritan Hospital rather than in the Matson Memorial as it was felt that at the moment the injuries of the extremities and body and spine were of more importance than the chest, and at least determine how bad they were.

Q. Doctor, what was your diagnosis of injury at that time?

A. Sprains of the neck and the low back and fractures undetermined until better X-rays could be made.

Q. Fractures?

A. Fractures undetermined until better films could be obtained.

Q. Doctor, then did you order her removed from the hospital to another hospital? What hospital did you transfer her to?

A. We took her to Good Samaritan Hospital in Portland.

Q. Then, doctor, did she continue under your care at the Good Samaritan in Portland?

A. She did.

Q. What did your treatment consist of after that time?

A. What did the diagnosis consist of, did you say?

Q. No, first your treatment.

A. The treatment consisted of bed rest, observation of the problems, whether or not they were getting worse, whether there was just muscle spasm or—X-ray studies were taken and ruled out the

(Testimony of John F. Abele.)

questions of fractures or broken bones. No fractures were determined. She was treated with—I believe she had head traction. She was placed in traction on the head and traction on the leg. Traction means a steady [55] pull by a weight over a pulley on a rope attached to the limb or, in this instance, also the head, in order to allay, quiet down the muscle spasm and relieve her of her pain while nature permits healing to occur in the sprained ligaments.

Q. Doctor, what was your diagnosis?

A. The diagnosis after she had been more thoroughly studied consisted of sprain, rather severe, of the neck and of the low back and a problem which we called coccydynia which means painful coccyx or tail bone which developed, oh, we first recognized the complaint from here about five or six days of observation. The other problems were to my mind more important to her, and as they subsided, why she started to complain about her tail bone hurting her, and the treatment of that consisted of conservative management with heat and sitz baths. That is merely a German word for sitting, to sit in a hot bath of water, which again allays the pain by quieting down the muscle spasm. The remainder of the treatment was supportive garment and teaching her the mechanics of avoiding strains of the neck and of the low back and of the tail bone. The treatment there is more or less to try to keep the weight off the tail bone without sitting on it, but they most of the time have found out what to do, sit on one buttock or the other. They

(Testimony of John F. Abele.)

refuse to sit directly on the tail bone. I think on my diagnosis there were some minor things such as contusions, which is bruises of the hip [56] from having been struck against some object. That was the right hip.

Q. Doctor, how long did she remain in the hospital?

A. Mrs. Walker remained in the hospital from May 4th to May 21st. When she left there was a question on her part of financing her care——

Mr. Gearin: We ask that that be stricken and the jury be instructed to disregard it.

The Court: Very well.

The Witness: This had something to do with my discharging her.

The Court: Very well, go ahead.

The Witness: She felt she could carry on as well at that state at home, and I agreed that she could if we observed her, and she was then sent home on that date which was the 20th, less than about, I guess, eighteen days of hospitalization.

The Court: Doctor, did the X-rays show any abnormality of her bones?

The Witness: They did. There was a congenital anomaly, but that was all.

The Court: That was something she had long before the accident?

The Witness: Yes, sir.

The Court: Are there any deformities or any fractures shown by the X-rays which resulted from the accident?

(Testimony of John F. Abele.)

The Witness: No fracture, that is, disturbance of a [57] bone alignment within each bone. There is a disturbance in alignment of the tail bone.

The Court: Show that one.

The Witness: The tail bone is the segment or small set of bones that is a continuation of the sacrum. That is part of the spine in the anterior pelvis girdle or basin, and the sacrum wedge has a curve, a swing forward just like the curve of the buttock, and the tail bone tucks under just like a dog tucks its tail between its legs, well, the tail bone has a normal sweep forward.

The Court: Where were those X-rays taken that you wanted, at the Good Samaritan or at Matson?

The Witness: I imagine they are Good Samaritan X-rays.

The Court: That is No. 5.

The Witness: Any film of the pelvis would show it.

Mr. Peterson: Your Honor, Exhibit 5 consists of a variety of X-rays but none taken after May 3, 1953, and I showed them to counsel, and I thought that they were here. I thought they were in that envelope here.

The Court: In other words, you do not have the X-rays that were taken by Dr. Abele or under his direction. Do you have any X-rays of your own?

The Witness: There may be some at the office. Any X-ray of the pelvis will show.

The Court: Do you have an X-ray of the [58] pelvis?

(Testimony of John F. Abele.)

Mr. Peterson: Yes, I have, your Honor, a number taken at the Tuberculosis Hospital, your Honor.

The Witness: Those, as I recall, were not too good films as they are taken and used to take care of the chest.

The Court: Look at the ones presented by Mr. Gearin. What numbers are those?

The Witness: There is only one film here, sir, that could be shown that has any value, and this is a front to back view and is not a lateral.

The Court: What is the number?

Mr. Gearin: 5, your Honor, they are in the big folder, Defendant's Exhibit 25. I can find them if I approach the bench, your Honor.

The Court: Very well.

Mr. Gearin: Here they are, your Honor. (Presenting X-rays from Defendant's Exhibit 25.)

The Witness: This is an A/P. This is a picture of the body at the pelvis or hip level. Here is the lower part of the spine which is the small of the back, the pelvis, the thigh bones, the hip joint, the sockets. Now, in the center of the pelvis basin or circle is a wedge-shaped bone which is called the sacrum, and that is part of the spine bones, but they have grown together in all people. There are five segments, and the first one is wide, and they narrow down until you get to the bottom, and then there are three [59] small segments that make a little tail, and, normally, the wedge comes straight down. This picture is a little bit—the pelvis is turned, you see, one side is more prominent than

(Testimony of John F. Abele.)

the other. An X-ray is a paper thickness of the width of the body so everything is supervised or piled on top of themselves so we have to look more or less through this.

The spine more or less drops down directly back from the center of the neck and down to the tail and between the legs. If you dropped a plumb line you could see here that the tail swings off to the patient's side. I do not remember whether it is the left or the right. It is to the right if this marker is on the right, but that is inconsequential. Anyway, it is off to the side.

Q. (By Mr. Peterson): Doctor, where is this congenital anomaly?

A. The congenital anomaly is here at the top of the sacrum where it meets the low back. Normally, the tips of the spines that you feel on your back when you run your hand down it form an arch that comes up, and underneath the arch the spinal cord runs between each vertebral bone. Now, the arch is incomplete on the tip of the sacrum bone. The significance of that is debatable. We feel it is an architecturally weak structure, but many times we find it in people who have no complaints.

Q. (By Mr. Peterson): Where is the [60] coccyx?

A. Here is the sacrum. The very tip of the sacrum are the three little bones of the coccyx, right here (indicating). They are a movable structure. You cannot take the sacrum and move it up and down, but with one finger in the rectum and one

(Testimony of John F. Abele.)

finger on the skin you can move the tail bone, and it should be painless, and when you sit on it it moves a little, normally. I have another view here.

Q. If you have another view, let me ask about this.

A. Ordinarily, in taking X-ray studies we take two projections so that we can visualize this body because everything, as I said, is all piled down to the one paper thickness, and you cannot really tell a structure.

The small of the back curves forward. We sway; all of us do, some of us more than others. Then the sacrum, the wedge that we saw swings backwards, takes a curve just like the curve up the buttocks. Then the sweep on forward, the tail bone, the sweep forward, and in Mrs. Walker's instance the tail bone is very prominent. When you feel down there it bumps right into your fingers as soon as you approach it; whereas, normally, it should swing forward, and when you put your finger into the rectum coming over this way you have to curve it over to get in front of it. In her instance it is quite straight.

Q. Doctor, do you have an opinion as to whether or not this displacement or abnormality so far as the coccyx is [61] concerned is due to trauma or injury?

A. It is an assumption mainly to the fact that it does not exist as a normal pattern at all as all of them sweep forward. She had no story of trouble there before. She had an accident. She started complaining of this area within two or three days of the

(Testimony of John F. Abele.)

time of her injuries, and she has persisted in complaint of that since.

Q. Doctor, in respect to the coccyx, do you have an opinion as to whether or not she will be required to undertake further surgery?

Mr. Gearin: You mean she has had some surgery?

Mr. Peterson: Strike "surgery." Pardon me.

The Witness: I think that she could be helped with surgery. This is a problem that we postponed surgery hoping that conservative management will make her satisfied and not have complaints regarding it. However, it has been since May, 1953. She has gone through 1954 and started into 1955, and she still has discomfort on sitting directly on her buttocks for any length of time. She has got to keep shifting. The use of sitz baths will give her some relief, but she does not gain complete, total relief. She has a permanent disability. Why do we not do surgery earlier? Surgery in this instance merely is the removal of that segment of bone and takes out the painful joint. There is no longer any joint. However, somewhere between 30 and 40 per cent in average after the surgery continue [62] to have some discomfort in the scar, but around 60 to 70 per cent are completely relieved of their symptoms. Now, if you can overcome that with conservative management, you save the patient time loss, discomfort of surgery, and hazards that go with surgery. That is, you cannot guarantee that you are going to give them a perfect result. I do not advise

(Testimony of John F. Abele.)

going ahead with surgery immediately, but she has had what is considered a fair trial of conservative management, and she has not improved.

Q. Doctor, on such surgical procedure would that require hospitalization?

A. It would require hospitalization.

Q. How long would she have to be in the hospital?

A. Two to three weeks.

Q. Would she be required to wear any support or anything following that?

A. I would not expect so. For the coccyx you are speaking of?

Q. Yes, for the coccyx. Doctor, in relation to other injuries of her low back, do I understand you correctly to say that she had a lumbosacral sprain?

A. Yes.

Mr. Gearin: He did not say that. He said low back sprain.

Mr. Peterson: I will withdraw the question.

Q. Am I correct in understanding you to say that she had [63] a low back strain?

A. Yes, I did say low back strain?

Mr. Gearin: Yes.

The Witness: I do.

The Court: Start over again. What did you say, Doctor?

The Witness: May I ask the recorder to repeat? I do not recall whether I said lumbosacral strain or low back strain. They are in the same area.

The Court: What did she have?

The Witness: She had lumbosacral sprain.

(Testimony of John F. Abele.)

The Court: Proceed.

Q. (By Mr. Peterson): Doctor, have you an opinion as to whether she will require further treatment for that condition?

A. A lumbrosacral sprain has also persisted under the ordinary activities of her living in the last year plus, and I think that she should be treated conservatively with a support to support the strained areas that seem to be chronically irritated. If when she tries to relieve herself of the garment her symptoms keep recurring, then I think it would be advisable to do surgery there in putting in bone grafts to support the weakened joint. In the majority of these people, I would say maybe that would occur in only 10 per cent of them; however, if you are trying to make a decision of what her needs are, you would have to consider that as a strong probability, that surgery might be indicated. [64]

Mr. Gearin: I ask that that be stricken, your Honor, based upon the doctor's statement that it might be indicated.

The Court: The objection is denied.

Mr. Gearin: Very well.

The Court: It does not mean that that might be sufficient evidence to go to a jury.

Mr. Gearin: I understand, your Honor.

Mr. Peterson: Could I ask the doctor a question pertaining to that?

The Court: Proceed.

Q. (By Mr. Peterson): Doctor, is it reasonably probable that Mrs. Walker will be required to un-

(Testimony of John F. Abele.)

dergo a further surgery on the low back which you have described in relation to the lumbosacral strain?

A. It is.

Q. What is the nature of the surgery that she will be—it is reasonably probable she will be required to undergo in respect to that?

A. The surgery would consist of obtaining bone struts to strengthen the internal architecture of the spine, that is, the skeleton at the area that is constantly sore.

Q. How long would that require her to be in the hospital?

A. Circumstances vary. She would be required to be an absolute hospital patient for about three weeks. Then with a body cast, if the situation is right at home, she could be [65] at home. She would wear a cast somewhere close to two to three months, until X-rays show the union, cementing of these bone fragments that have been placed in there, these struts, has developed and she can go without her cast.

Q. Doctor, what is the probable cost of future hospitalization and surgery such as you have described?

A. May I ask, are you referring to both the coccyx and the——

Q. Both the coccyx and the fusion that you have just described.

A. A fusion operation, the surgeon's fee is figured around \$350, and the coccygectomy about \$150. I think the anesthetic fees would each, would

(Testimony of John F. Abele.)

run about \$20 each. They are not procedures you can do together. They have to be done separately. She would have two periods of at least three weeks each in bed at the hospital, and there would be a five- or ten-dollar laboratory fee each time. There would be additional X-rays and probably the X-rays would run, total before she was through of \$75.

Q. That is on each one?

A. No, that is the total of the two.

Q. Total of the two. What would be the reasonable cost of her hospital bill for these two surgical procedures?

A. Pardon me. In giving you those statements, the only professional costs would be a charge for the surgery. The other figures are for hospital charges except for their daily rate which runs around \$16, something like that, a [66] day. She would have two three-week periods that you would figure.

Q. Yes, she would have a total of six weeks at \$16 per day.

A. Then there would be a garment, and there would be a cast. A garment runs about \$20, and the cast probably about the same, \$30. Those are very loose figures.

Q. Doctor, do you have an opinion as to whether or not she has any permanent injury as the result of the accident as a result of the injuries for which you have treated her?

A. Yes, I do have an opinion.

Q. What is your opinion?

(Testimony of John F. Abele.)

A. She has a permanent partial disability involving her lower spine and her coccyx.

Q. Doctor, is the sum of \$25 a reasonable charge for an examination at the Albany General Hospital?

Mr. Gearin: If you have a bill, I will stipulate to it, Mr. Peterson.

The Court: Where is the bill?

Mr. Peterson: I do not have the bill. I had my secretary compile them all based upon either the doctor or the hospital.

Mr. Gearin: If you say what it is I do not have objection.

The Court: How much is the bill?

Mr. Peterson: The total I have is—— [67]

The Court: What have you got down there for Dr. Tuhy?

Mr. Peterson: \$137.

The Court: In other words, it is stipulated that if persons were called from the hospitals, or physicians, they would testify that these amounts to which Mr. Peterson has referred were all reasonable and that they were incurred as a result of the injuries which Mrs. Walker sustained on May 3rd. However, the defendants do not admit that they were responsible for any portion of it. As you know, they are denying that their truck was even in the vicinity at the time of the accident.

Q. (By Mr. Peterson): Doctor, insofar as the neck injury is concerned, did she recover from that?

A. I think she has.

Q. As I understand it then, the residual that she

(Testimony of John F. Abele.)

has is a low back sprain and an injury to the coccyx? A. Yes, sir.

Q. This coccyx injury, I understand, amounts to a misplacement or displacement of it?

A. For practical purposes, it amounts to displacement. At least that is apparent in the X-rays; however, many people have painful coccyges from an injury which show very little displacement.

Mr. Peterson: May I ask the doctor his own bill?

The Court: Is that not in there? [68]

Mr. Peterson: It is, your Honor, but I have not detailed it.

The Court: What was your bill?

The Witness: Our bill total is \$162 except the last visit on February 2nd of this year.

Q. (By Mr. Peterson): What is the reasonable cost of that?

A. Her bill on February 2nd, there is a total of \$30 there for new X-rays and examination.

Q. That is the last time that you have seen her?

A. Yes, I did not see her through, from August, 1953, until February, 1955.

Q. Doctor, do you have an opinion as to whether or not she will suffer pain in the future?

A. I believe that she will.

Q. Will she suffer pain for the rest of her natural life? A. I believe that she will.

Mr. Nelson: You may take the witness.

(Testimony of John F. Abele.)

Cross-Examination

By Mr. Gearin:

Q. Doctor, you say that probably she is going to have to have surgery on the low back?

A. I do.

Q. That is notwithstanding your testimony that perhaps only 10 per cent of people in her condition would require it? A. I do.

Q. And you say that you ought to try to support the back, [69] and if that does not work then perhaps you take a look and maybe then have surgery?

A. I do not remember saying anything about taking a look. You mean like in, as they undergo surgery?

Q. No, just take a look at the patient?

A. Oh, yes.

Q. That is right, and you do not say now that she needs surgery, do you?

A. You mean that she needs surgery now or do I now say that she needs surgery?

Q. Yes, she needs surgery now?

A. Today?

Q. Yes. A. No.

Q. You want to try a support before you send her to the hospital for surgery? A. Yes.

Q. You have not furnished her with support, have you?

A. I do not know whether I have in the past or

(Testimony of John F. Abele.)

not. I can see there she had supportive therapy, but for the year that I did not see here she lived quite a normal life, had a baby, but developed all of her symptoms to the point where she could not take it any more.

Q. She had a normal life in the period of time that you have not seen her?

A. She carried on an existence that we call a normal life, that is, having a family. Whether she did it without [70] symptoms, she had symptoms, or maybe it would not be so normal.

Q. Why haven't you prescribed a support for her before this?

A. You mean before this, you mean today?

Q. Yes, before you say that it is probable she will have to have surgery.

A. Well, the last that she came to my office was in August, 1953.

Q. Yes?

A. At that time—I cannot see here whether or not I did give her a support. (Consulting notes.) When I saw her in August, 1953, the problem was mainly related to her tender tail bone, and she was still complaining of a chronic lumbosacral complaint or problem which should have been fairly well resolved with the amount of her bed fast care. I saw her a few weeks later again in the office. She was much better in the right leg and hip but still troubled with the low back. She was having some trouble with her eyes. She was sent to Dr. Martin. Her coccyx remained sensitive. She had what she

(Testimony of John F. Abele.)

calls a slump, that they speak of as a pneumo slouch, people who are taking air injections in the chest.

Q. What they call pneumotherapy?

A. Please?

Q. That is pneumotherapy she was talking about?

A. Yes, and so instructions were given to her in body posture to try and eliminate the strains that were being incurred in her back. [71]

Q. May I interrupt you there, Doctor? Sometimes people who have problems with posture develop low back pain, do they not? A. Yes.

Q. Especially if they have a pre-existing condition such as you found here in this woman?

A. Yes.

Q. Such as spina bifida occulta? You pronounce it, not me.

A. Spina bifida means, bifida, two parts.

Q. That is right. She had that before this accident?

A. She was born with that. She had no complaints with it.

The Court: Are you all through?

The Witness: He is still trying to find out if I put a corset on her. I cannot find in my notes if I did.

Q. (By Mr. Gearin): Doctor, did she give you a history of a serious fall occurring a year before this automobile accident?

A. I do not recall that she did.

(Testimony of John F. Abele.)

Q. Assuming, Doctor, that on May 10, 1952, the plaintiff, Dorothy Walker, fell with great violence and sustained severe injuries to her back, would the condition that you have described here——

The Court: Of the back?

Mr. Gearin: Yes—be affected by a serious fall?

A. Yes, it would.

Q. And that would have an effect upon your diagnosis and [72] your prognosis?

A. I have a vague suspicion that she did mention something about having had an injury. I do not have it in my notes, but it seems to me that there was something—I couldn't really testify to that though.

Q. You said that she told you that she was not unconscious in this accident?

A. She was momentarily dazed.

Q. But she was not unconscious?

A. That is right.

Q. As far as this coccyx is concerned, if you prescribe a corset you have to crowd it into—indicating with my hands—that is what they all a lower buttocks support, anything treating, treatment with that type of support to alleviate——

A. I have not put a corset on her.

Q. This treatment is a treatment that is used quite frequently by orthopedists to alleviate pain in a coccyx; is it not?

A. Almost any type of support is used on these patients from two-way stretches all the way on up.

(Testimony of John F. Abele.)

They are not very satisfactory. They are uncomfortable, and the patients usually won't wear them.

Q. You took some X-rays——

A. If you put on something snug around there you squeeze the buttocks in, and most of the times they complain of that. [73]

Q. When you saw her this year that was not for treatment, was it, Doctor?

A. It was for examination, determination of her present condition.

Q. That is right, for the purpose of this trial?

A. Yes.

Q. You took some X-rays, did you?

A. Yes.

Q. You do not have them with you now?

A. No, I do not.

Q. Isn't it a matter of fact, Doctor, that even among the field of orthopedists that there is a difference of opinion as to the advisability of surgery to correct pain in the low coccyx or in the coccyx?

A. There is more uniformity about the coccyx than many other parts of the orthopedic field.

Q. May I see your notes, Doctor?

A. Surely.

(Presenting notes.)

Mr. Gearin: I have nothing further.

The Court: Do you have any further redirect?

Mr. Peterson: Your Honor, I would like to ask the doctor if he made any entries in Good Samari-

(Testimony of John F. Abele.)

tan Hospital records and ask that they be handed to him to refresh his recollection, if he did. [74]

Mr. Gearin: He has not testified, your Honor, that he needed to be refreshed.

The Court: What difference would that make?

Mr. Peterson: It has not been received in evidence. Counsel just advised me that he objects to the Good Samaritan Hospital records being received in evidence, but I just asked if he would have any objection to the doctor refreshing his recollection from them, and he said no, and I propose to ask the doctor if he has made entries there.

The Court: Is there any objection to the entries which the doctor made? .

Mr. Gearin: That is one of the bases of the objection, your Honor. It contains statements made by the doctor to other doctors concerning which there would be no cross-examination, and especially as to the facts concerned with this witness. I have no objection to the hospital record as such. I do object to the doctor's comments of the opinion contained in the hospital record, and if the doctor needs to refresh his memory I have no objection to the use of this to refresh his memory, if his memory does need refreshing.

The Court: I have ruled earlier, and I thought you did not agree with me, Mr. Gearin, that I would not permit any hospital records or any portion of the hospital record which expressed an opinion of a doctor, nor would I permit any portion of a hospital record, except for purposes of [75] impeach-

(Testimony of John F. Abele.)

ment, concerning the manner in which the accident occurred. I also ruled that the letters of Mr. Kliks would not be admissible.

Mr. Gearin: Thank you.

The Court: I thought you took issue with me as to the statements and opinions of these doctors.

Mr. Gearin: I did not understand, your Honor, that you would let them in for the purpose of impeachment, and that is why I wanted them in the record in that I could use them subsequently for the purpose of impeachment.

The Court: I shall rule now that the hospital records are admissible, except those portions which contain the opinions of doctors or nurses, and, likewise, any letters from attorneys may not be admitted. I think you already stipulated to that.

Mr. Peterson: Yes.

The Court: What is it you want Dr. Abele to do?

Mr. Peterson: I want to have the opportunity of handing the hospital records of Good Samaritan Hospital to him and then ask him some questions so that he may refer to them to refresh his recollection as to the condition of the patient on admission.

The Court: Yes, that is perfectly all right. Do you know about her condition at the time she was admitted to the hospital?

The Witness: Yes.

The Court: Do you need the hospital records to refresh your memory? [76]

The Witness: If they ask me about dates, I will.

The Court: What is it you want to know?

(Testimony of John F. Abele.)

Q. (By Mr. Peterson): Doctor, at the time of her admission to Good Samaritan Hospital did she have muscle spasm of her back?

A. Yes, she did.

Q. What is the significance of that, Doctor?

A. Muscle spasm is nature's method of splinting or supporting a sore area or, in this particular instance, joints, and you observe the muscles splinting by seeing the absence of normal curvatures that people have such as in this accident there would be a flattening of the back rather than having a little sway. There may be a little tilting to one side or the other which nature does in the way of splinting, and that was present in her case for several days.

Q. Doctor, to a medical expert state whether or not that is evidence to you of recent injury?

A. Yes, it is.

Q. Doctor, assuming that the patient had no pain in her back prior to this accident of May 3, 1953—strike that——

Assume that she fell at the entranceway to Jake's Crawfish on May 10, 1952, and injured her chest, and assume that she had some pain in her low back. Assume that the pain in the chest and the back both cleared up in a matter of weeks, and from that time until the injury which she [77] described to you she had no pain in her back. Now, Doctor, would you have an opinion as to whether or not the previous injury of May 10, 1952, had anything to do with that injury which you have described?

(Testimony of John F. Abele.)

Mr. Gearin: Objection, your Honor, on the basis it assumes facts not in evidence.

The Court: I think, Mr. Peterson, that there is no evidence in the record to indicate that this injury to her back cleared up in the space of two or three weeks. In fact, I think that the witness, or the plaintiff admitted in a deposition that was taken some three months after the accident was that she was still suffering from pain with this condition that occurred at Jake's.

Mr. Peterson: Well, your Honor, as I recall her testimony, I think as to the clearing up within weeks, I do not think that was in evidence, and I would propose to call a witness and to ask her about that, and I would tie it up by appropriate questions to the witness, if permitted.

Mr. Gearin: I will stipulate it can be done later, your Honor, to suit the convenience of the court.

The Court: Answer the question then. Assume that the back condition cleared up in a matter of weeks from May, 1952. Then what do you want to know?

Mr. Peterson: I want to know if that is of any medical significance, in your opinion, following the injury of May 3, 1953? [78]

The Witness: Very remote. I would like to know if people had injuries before, but if she had no symptoms for a period of eleven and a half months, why, I would not think that it would have any relation.

Q. Doctor, do you recall whether or not you re-

(Testimony of John F. Abele.)

lated to the patient anything in respect to her back support while she was under your care?

A. There is hardly a day goes by that I do not say. I do not recall the specific instance, but I would be very surprised at myself if I hadn't.

Q. Do you recall having told her anything in respect to wearing a corset or a girdle?

A. Oh, I know I did here this February, that if she was still having symptoms that kept coming back all the time that we should try a support for a while, and if it did not work and she could not get away from the support and wanted to, why, she should have a fusion operation.

Mr. Peterson: No further questions.

Mr. Gearin: Nothing further, your Honor.

The Court: That is all, Doctor. You are excused from further attendance at the trial.

(Witness excused.)

Mr. Peterson: May I make an offer of proof at the recess without having to ask the doctor questions by just stating what the question would be? [79]

Mr. Gearin: What doctor?

Mr. Peterson: Dr. Abele.

Mr. Gearin: I do not think that is appropriate.

The Court: Are you talking about the fact that Mrs. Walker testified that her condition cleared up in a matter of weeks?

Mr. Peterson: I desire to make an offer of proof that the Court related to me that I could make.

Mr. Gearin: I will stipulate as to that. I talked

it over with Mr. Peterson. I know the matter to which he refers, your Honor.

The Court: Do you want to make an offer of proof during the recess?

Mr. Peterson: Yes, on the recess.

The Court: You may do so.

Mr. Peterson: May I do it in the absence of the doctor?

The Court: Yes. [80]

PHILIP SELLING

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

The Court: What is your specialty?

The Witness: Internal medicine and neurology.

Mr. Gearin: We will stipulate he is qualified in that field, your Honor.

The Court: It is stipulated that Dr. Selling is a qualified physician and that he specializes in internal medicine and neurology.

Direct Examination

By Mr. Peterson:

Q. Dr. Selling, are you associated with the Portland Clinic in Portland, Oregon? A. Yes, sir.

Q. Dr. Selling, has Dorothy Walker been a patient of yours? A. Yes.

Q. When did you first see her?

A. I saw her first on October 21, 1953.

Q. Doctor, did you examine her at that time?

(Testimony of Philip Selling.)

A. I examined her at that time.

Q. Did you obtain a history of injury from her?

A. I did so, yes.

Q. What was the history of injury?

A. The history was that she has been [81] driving——

Mr. Gearin: Your Honor, may I interpose an objection. I would like to ask Dr. Selling a preliminary question if I may.

The Court: What is the question?

Q. (By Mr. Gearin): Dr. Selling, was Mrs. Peterson referred to you for examination or for the purpose of treatment?

A. She was referred to me——

Mr. Peterson: Counsel, this is Mrs. Walker. You said Mrs. Peterson.

Mr. Gearin: I am sorry. I have been thinking about you all afternoon.

Was Mrs. Walker referred to you by Mr. Peterson for the purpose of examination or for the purpose of treatment?

The Witness: She was referred to me by Dr. John Tuhy for treatment, and it was stipulated a report be sent to Mr. Peterson.

The Court: Proceed.

Mr. Gearin: Go ahead.

The Witness: The history related was that at an early day in May, and I learned from the report sent to me this was approximately May 3rd, she had been driving along a highway near Albany, Salem, and had noticed a truck coming the opposite

(Testimony of Philip Selling.)

direction, which truck had forced her to swerve off the highway. She recalled nothing until about thirty to forty-five minutes later at which time she first noticed consciousness again. She stated that when she regained [82] consciousness she had severe pain in her head, neck, hip, and that she had been vomiting, had coughed up and vomited blood which was present at her mouth. She related that friends told her but she could not recall this, that she had gone over the embankment in a car and had crawled back up although she didn't remember anything about this particular crawling experience. She stated she had been sent to a hospital from which she had been transferred to Matson Memorial Hospital on the East Side where she had received treatment and had been there at, I believe, Good Samaritan Hospital for a period of about three to four weeks—I think she said about three weeks—receiving treatment for the neck and back, and the head symptoms at that time being related primarily to the neck disturbance.

Mr. Gearin: Your Honor, I note that Dr. Selling is referring to the notes, and I know from personal knowledge that those are notes that have not been marked with a pre-trial exhibit number. I would have no objection to them except for the fact that it was not until today that I was advised that there had been a neurological examination, and I have not seen it, so that for that reason I am going to object to it as much as I dislike to do so.

The Court: First, we will have the notes marked.

(Testimony of Philip Selling.)

(Document, notes of Dr. Selling, marked Plaintiff's Exhibit 19 for identification.)

The Court: When did you first examine Mrs. Walker? [83]

The Witness: October 21st.

The Court: Of what year?

The Witness: 1953.

The Court: Are you contending that you attempted to find out whether Dr. Selling had examined her, from somebody else, and that this information was withheld?

Mr. Gearin: No, your Honor, I am not, but I just did not know about it, and it was subsequent to the deposition.

The Court: Subsequent to the deposition?

Mr. Gearin: Yes, the deposition was taken before his examination, Dr. Selling, and I do not know at that time—of course, the plaintiff had Dr. Selling. I did not have any knowledge or information that she had been subsequently examined by him. I make no accusation for anything that has been withheld so far as this examination is concerned.

Mr. Peterson: I furnished counsel with the doctor's report which has been marked here, I believe Mr. Young.

Mr. Gearin: We had copies some time ago of Dr. Abele's and Dr. Tuhys report.

Mr. Peterson: Did I not tell Mr. Young that he had been given a copy of the report?

(Testimony of Philip Selling.)

Mr. Gearin: We have not received a copy of it. I have no knowledge of it. Mr. Young is not here.

The Court: We will mark it. From now on, Mr. Peterson, I suggest that you list the names of the doctors under the [84] exhibits. There are no doctors listed in your list of exhibits. Proceed.

Mr. Peterson: Proceed, doctor.

The Witness: She had had following this injury and a period of hospitalization a continuing series of headaches, and she had noticed frequently giddiness and a slight sense of insecurity on turning which had not given her too much trouble, but it had required something to particularly relieve the head pain. The reason for which I was asked to see her was that she had began to suffer dizziness and fainting spells as well as headaches. In mid September, the date being forgotten, she got out of bed and nearly fainted. Then on October 1st she remembers getting out of bed, going down to make some coffee, walking from one room to another, suddenly turning the head and body and nearly fainting and becoming sick to her stomach and having a sense of true vertigo as those with seasickness feel. The next upset occurred November 11, 1953, when she got up to leave a movie at the Orpheum Theater when she suddenly started to leave consciousness, fell down forward and very shortly afterwards was able to get up. She did fall down several stairs and bruised herself badly. This is all the instances, the history which I obtained as

(Testimony of Philip Selling.)

it relates to the accident. There were other details such as previous operations and previous illnesses, which, I presume, are a matter of record and did not seem to bear on this illness. [85]

Q. Doctor, did you examine the patient at the time? A. I did.

Q. What did your examination consist of?

A. The examination consisted of a complete neurological examination including an appraisal of the psychiatric state. It was my opinion that she was sane and sensible, co-operated well, was not emotionally unstable. I do not remember whether she had a headache on the day of the examination. There was a little numbness of the left upper chest, arm and head, which numbness, I presume, had been due to some brain injury. It was definite, and it followed the distribution of the nerves which made it very evident to me that it was a real and not a simulated numbness. She had a very slight numbness of that hand which, well, could have been due to numbness and could have been due to brain injury. The one single significant fact which I picked up on the examination was that a sudden change in her position, sitting up suddenly or lying down suddenly, would make her eyes tend to rotate in a peculiar fashion which we call nystagmus. This is something which means that either the brain or inner ear has been affected in some way. This could be produced only, as I say, when she suddenly changed position. There were no other changes whatsoever. A spinal puncture was performed, and nothing was found

(Testimony of Philip Selling.)

such as pressure on the brain or brain disease. A radiogram X-ray of the skull was taken which I regret I did not bring [86] but which was entirely normal and showed no fracture. A brain wave test was carried out—we call this an electroencephalogram—in an attempt to find evidence of brain injury, and this test was reported as border line abnormal, and it reported furthermore there was a small spot in the left back portion of the head which we call the left occipital temporal region where the brain waves were not quite normal. It was my impression on inspecting these that these abnormalities were minimal, that they could be truly related to the accident but that they did not mean very much and that they are the sort of thing anybody could have from being punched in the head two or three times. That was the extent of our examination at that time.

My diagnosis was that she had had a concussion; that she was having post-traumatic headache; that she was having post-traumatic dizzy spells, and that these were readily attributable to that accident since I had no evidence of any other cause for such symptoms, but it was my impression at that time that the headaches, dizzy spells, numbness, and slight uncoordination of the arm would all disappear in time, and she was reassured to this effect.

Q. Doctor, have you seen her since that time?

A. Yes, I have seen her on February 16, 1955, at your request.

Q. Doctor, can you tell us the examination, the

(Testimony of Philip Selling.)

nature of the examination, and your diagnosis? [87]

A. On this last occasion?

Q. Yes, in the last examination.

A. On this last examination she was given a general examination, including the usual things a physician does with an examination, but I did not examine the back. Dr. Abele had taken care of that. I did not examine the pelvic organs since Dr. Lage had examined her in one of her usual checkups following her baby, following her delivery. I also examined her neurologically. She had a pneumothorax, a collapsed lung, which Dr. Tuhy probably would—that was no objective evidence of any disease whatsoever on this last occasion. In the general examination or neurological examination I did not repeat the skull. I did not repeat the spinal fluid because I saw no indication for redoing previously normal tests. I did have a brain wave test, which I have here, which showed again that borderline change which is something we see so frequently in normal people, and I would not be very loath to call this normal. At this last brain wave test it was observed that there was no evidence any more of this small spot in the back of the head which had previously showed some abnormality.

Q. Doctor, did you obtain an iterim history?

A. Did I what?

Q. Did you obtain an interim history? [88]

A. Yes, at that time she related that she was now having headaches which might last a few hours to all day; that they occurred from once every two

(Testimony of Philip Selling.)

weeks to perhaps two a week. I went into this in detail because she was using empirin and codeine, and we all know that codeine is a narcotic, and she related that she took them only on the days with headaches so I was reassured that she was using them properly and was not having continuous headache. She occasionally would continue to experience sudden vertigo when she would get up or lie down, and she stated that within the last year—she said in the last eighteen months she had had brief fainting spells on about eleven occasions. In spite of this, she had gone through normal pregnancy, the baby being born October 18, 1954. She herself was feeling in the best of condition. She had mentioned on her first examination a slight deafness of the left ear, and she mentioned it again on her second examination. It was a very minor border line decrease in hearing in the left ear which very well could have been an incidental finding quite commensurate with her age.

Q. Doctor, do you have an opinion as to whether or not she will have any pain in the future?

A. I believe so.

Q. In your opinion, how long will that persist?

A. Headaches of this sort have a tendency to gradually [89] disappear anywhere from one to three years, but they do disappear.

Q. Is it your opinion, Doctor, that the headaches will persist for a period of time in the future but then will clear up? A. That is correct.

(Testimony of Philip Selling.)

Q. Do you have an opinion as to whether or not she has any permanent brain damage?

A. I believe not.

Q. Doctor, in layman's language the concussion that you referred to, does that mean, are you referring to brain concussion?

A. A brain concussion such as one gets when they are hit on the head by any means.

Q. Doctor, you also mean brain damage by that term?

Mr. Gearin: That is leading, your Honor.

The Court: Go ahead and answer that, Doctor.

The Witness: The brain damage is the acute effect of an injury. The after effects are not permanent. There is no permanent damage unless there are a long series of injuries such as you find in a boxer who has been hit repeatedly.

Q. (By Mr. Peterson): Then, Doctor, would you characterize this as being temporary brain damage? A. Precisely.

Q. Doctor, will this patient require any further medical [90] care in respect to that injury?

A. No.

Mr. Peterson: No further questions.

Mr. Gearin: I have no questions, Dr. Selling. Thank you.

(Witness excused.) [91]

JOHN E. TUHY

a witness called in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Gearin: We will admit the doctor's qualifications.

The Court: What is your specialty, Doctor?

The Witness: Diseases of the chest.

The Court: The qualifications of Dr. Tuhy are admitted. It is admitted that he specializes in diseases of the chest.

Direct Examination

By Mr. Peterson:

Q. Doctor, are you associated with any other doctor in the practice of your specialty here in Portland, Oregon?

A. Yes, with three other physicians, Dr. William S. Conklin, Dr. Lawrence Lowell, Dr. Gordon L. Maurice, all chest specialists.

Q. Doctor, has Dorothy S. Walker been a patient of yours? A. Yes.

Q. When did you first see her as a patient?

A. May I refresh my memory from my notes?

(Document, notes of Dr. Tuhy marked Plaintiff's Exhibit 21 for identification.)

Q. (By Mr. Peterson): My question is, Doctor, when did you first see her as a patient?

A. February 12, 1952.

Q. Doctor, did you examine her at that time?

(Testimony of John E. Tuhy.)

A. Yes.

Q. What was the nature of your [92] examination?

A. The history and complete physical examination with an X-ray of the chest and X-ray, fluoroscope.

Q. Doctor, at that time where was she?

A. In my office at the Standard Insurance Building in Portland.

Q. What was your diagnosis of her condition at that time?

A. It was pulmonary tuberculosis moderately advanced, still considered active. She also had a partial collapse of her left lung by air treatments.

Q. Doctor, did she have a history of having been confined in a tuberculosis institution?

A. May I say that that diagnosis of tuberculosis was first made in 1947 by Dr. Morton Goodman and that this diagnosis was confirmed at the Mayo Clinic in October, 1951?

She then went to the Oregon State Tuberculosis Hospital at Salem, and she was there from December 8, 1951, until February 3, 1952. Her air treatments to collapse the left lung had been taken at Salem in the latter part of December, 1951.

Q. Doctor, after February 12, 1952, when was the first time you saw her?

A. Three days later, February 15th.

Q. Did you follow her after that time?

A. Yes, I advised at that time that she return to the hospital at Salem. There were adhesions

(Testimony of John E. Tuhy.)

which prevented good collapse of her left lung by these air treatments, [93] and I suggested that she return to the hospital and have those adhesions cut. This was done. She went to the Oregon State Tuberculosis Hospital about February 1, 1952, and remained there until about May 1, 1952. The adhesions were cut during this stay. I saw her next to give her air treatments beginning on July 3, 1952.

Q. Doctor, did you see her around May 10th or May 15th, 1952?

A. I can't say, Mr. Peterson. In our office when air treatments are given the record is usually kept separate from the rest of the chart, but it is my recollection that I gave her air treatments beginning early in May of 1952 following her discharge from the TB sanitarium.

Q. Doctor, do you recall, did she give you any history of a fall or a chest injury involving Jake's Crawfish Restaurant in Portland, Oregon?

A. No, sir. I took an interim history on July 3, 1952, listing the various complaints and the present condition, and I see no notation that she had had an injury around May, 1952.

Q. Doctor, was there any change in her condition between May 1st and July 3, 1952?

A. Excuse me, Mr. Peterson, between what dates again?

Q. May 1, 1952, and July 3, 1952?

A. No, it seemed to me from the X-rays that the condition was essentially the same. I have a notation on July 3rd that her X-rays were satisfactory;

(Testimony of John E. Tuhy.)

that there was a few small [94] shadows in the upper part of her right lung; that her left lung is pretty well collapsed by the air treatments and no significant change in her condition.

Q. Doctor, did she continue as your patient after July 3, 1952?

A. No, for part of that time she was under the care of our out-patient clinic, the University State Tuberculosis Hospital in Portland, and I saw her on a number of occasions. Examinations were carried out again, for example, in September, 1952; November 11, 1952; again in December of 1952, and at about that time, I believe, she started to get her air treatments at the University Hospital.

Q. Doctor, did you see her in May, 1953?

A. Yes.

Q. What was the first time that you saw her in May, 1953?

A. About eleven a.m. of May 3, 1953.

Q. Where was the patient at that time, Doctor?

A. At Matson Memorial Hospital in Milwaukie, Oregon.

Q. Did you elicit a history of injury from her at that time? A. Yes.

Q. What history of injury did she relate to you?

A. If I may quote verbatim from the record I took at that time:

“Admitted to Matson Memorial Hospital about 11:00 a.m., May 3, 1953, by ambulance from [95] Albany Hospital. About 1:00 a.m. of May 3, 1953, while driving between Albany and Salem, the pa-

(Testimony of John E. Tuhy.)

tient says she was forced off the highway by an approaching truck passing a car. She swerved to the right off the road, and thinks she was unconscious for an unknown interval. She crawled out of the car in spite of severe pain in her right hip and crawled up a bank. Here she coughed up a little blood (she was also told she had vomited and coughed up blood in the car). She also noted pain just below the occiput—"that is the back of the neck. "After about one and a half hours she was taken to Albany Hospital, and X-rays of the hip and neck were taken." The X-rays of the hip were said to show a fracture. "Shortly after having the X-rays, she raised about 50 ccs of fresh blood, and then about 15 ccs—" which would be about a teaspoon full—"several times during the morning. She has noted some increase in dyspnea and 'heaviness' in the chest, with non-pleuritic aching," meaning it didn't hurt her worse to breathe, "in the left lower chest and back and in the lower part of her dorsal spine. Pain in the [96] lateral aspect of the right hip—" that is from the side—"has been continuous, as has the aching just below the occiput, not especially worse on turning, though it is worse on flexion and extension of the neck," meaning bending, bending backwards of the neck. Continuing the history: "She was discharged from the Oregon State Tuberculosis Hospital in April, 1952. Taking left pneumothorax refills about every ten days at the University of Oregon Hospital, usually 200-300 ccs," cubic centimeters of air at a time, "the last on

(Testimony of John E. Tuhy.)

May 1st. She sits up two or three hours a day and is on her feet about an hour a day. On her last examination about April 15th her X-ray was said to be O.K.”

The Court: This was at the University Tuberculosis Hospital?

The Witness: Yes. “She ran a fever in the evening to 100-101 for about two weeks in March (occasionally to 102), but the cause was not determined. Her usual low-grade fever, to 99.2 or 99.4, has also continued. She has been taking isoniazid and streptomycin,” which is a good TB drug, “since November, 1952.

“Her weight is 105 pounds, and her strength [97] usually fairly good.” In fact, it had improved in the recent months. “Her appetite is fine. She usually has no cough or sputum, no chest pain or wheeze.” Her shortness of breath on exertion is unchanged.

That was the extent of the history.

Q. Doctor, did you treat the patient at that time? A. Yes.

Q. Did you follow her after that?

A. Yes, because of the suspected hip injury and her head injury I asked Dr. Abele, the orthopedist, to see her. He could not make out any fracture of the head and advised that she be transferred to Good Samaritan Hospital where the special X-ray equipment permits better X-rays of the hip, and this was carried out on the morning of May 4th, twenty-four hours later. I saw her at Good Samaritan several times, and here she continued to spit up

(Testimony of John E. Tuhy.)

some blood, oh, an ounce or two ounces on May 5th, May 8th, May 11th, for example, and I also saw her following her discharge from—yes, I saw her while she was at Good Samaritan Hospital. After that she continued to go to the University Hospital. I next saw her on September 4, 1953.

Q. Doctor, what was your diagnosis of injury?

A. Of injury?

Q. Yes. [98]

A. Before she was transferred to Good Samaritan I suspected that she might have a fracture of the right hip, but this was not confirmed. There were no fractured ribs, and I concluded that she had had a blow to her left chest and that the bleeding was in all probability coming from her left lung and that the source of bleeding in all probability was the place where she had had her TB originally. In her X-rays taken after the injury there were no new shadows to indicate that ribs had been fractured or that there had been any severe bleeding in the lung as sometimes happens after severe chest injuries, but I believe that in the blow on her chest the lung had been shaken up and that the blood had probably come from an area of the TB scars in her upper part of her left lung because she was a TB patient who, incidentally, had had TB germs in her sputum in October, 1952—TB germs had been found in culture in October, 1952, and so we did not consider her cured at the time of the injury but just, her condition was considered quiescent. After Oc-

(Testimony of John E. Tuhy.)

tober of 1952, to my knowledge, all of her sputums have been negative, but in view of this positive sputum hospitalization was considered again at that time, and I advised her to start on treatment with the TB drugs.

The Court: We will take a ten-minute recess.

(Jury retires for recess.)

Mr. Peterson: If Dr. Abele had been asked the questions as to the low back injury including both the coccyx and the [99] lumbosacral sprain in relation to pregnancy, he would have testified that Mrs. Walker spent the greater part of her pregnancy in bed because of the danger of miscarriage because of an induced birth, lumbosacral strain, and the coccyx injury displacement. The doctor would further have testified, if permitted, that because of the displacement of the coccyx delivery was prolonged and painful; that it might not otherwise have been true, and also that they stimulated Mrs. Walker in order to induce childbirth early, approximately at six months, in order to avoid excessive pain and suffering to her during the childbirth at normal period and in order to promote the chances of the child living because of the condition of her spine.

The Court: You said at six months.

Mr. Peterson: Seven and a half months, your Honor, seven and a half months.

The Court: I think you had better get the doctor back here. I do not think he is going to testify to that, and I do not want anything in the record as an

(Testimony of John E. Tuhy.)

offer of proof unless I believe that the doctor will so testify so if you want to make an offer of proof bring the doctor back at any time, and I am going to ask questions. I am going to reject it anyway for the reason that the pre-trial order does not disclose any of these contentions. Mr. Peterson, you are not an inexperienced lawyer in this court, and you [100] know the rules here, and the rules require specificity with reference to the type of injuries or nature of injuries which the plaintiff sustained; therefore, I will not permit this evidence to be introduced. I made an exception on the part of Dr. Selling although we do have a rule here that when new evidence is brought in which the other party had no opportunity to anticipate, he is entitled to a postponement of the trial in order to try to meet that evidence. I did not do that as far as Dr. Selling is concerned, but this type of evidence would, in my opinion, require me to permit a re-examination of the plaintiff and to give them an opportunity to attempt to meet it. I will take the doctor's testimony at nine-thirty tomorrow morning.

(Thereupon, the jury returned from recess, and the following proceedings were had.)

Q. (By Mr. Peterson): Doctor, did you see her after October, 1952? A. Yes.

Q. Did you follow her as a patient?

A. Yes.

Q. Doctor, this is repetitious, but I think you said it was on May 30, 1953? A. Yes.

(Testimony of John E. Tuhy.)

Q. At the Matson Memorial Hospital?

A. Yes, sir.

Q. Did you follow her at the Good Samaritan Hospital? [101]

A. Yes, sir.

Q. Did you hospitalize her at any place following the Good Samaritan Hospital hospitalization?

A. I advised her to go to the University TB Hospital on June 3, 1953. Actually, that was soon after her discharge from Good Samaritan. I advised her to go there.

Mr. Peterson: Would the clerk hand the witness Exhibits 30-A, B, C, and D?

(X-rays marked Plaintiff's Exhibits 30-A, B, C, and D for identification.)

Mr. Peterson: Counsel, do you object to any of these?

Mr. Gearin: I have no objection to any of the X-rays.

Mr. Peterson: They are offered in evidence.

Mr. Gearin: No objection.

The Court: They are admitted.

(X-rays previously marked Plaintiff's Exhibits 30-A, B, C, and D for identification received in evidence.)

Q. (By Mr. Peterson): Doctor, I wonder if you would take the films and tell the jury what those films show?

A. This film was taken on April 1, 1953—correction, March 31, 1953, at the University TB Hos-

(Testimony of John E. Tuhy.)

pital. These were taken about five weeks before the accident. This is her right lung, her left lung and her heart. The left lung is collapsed about 50 per cent by air. This is the air that has been injected here, has collapsed her left lung because [102] of her tuberculosis and rested. The TB shadows are seen in the collapsed upper portion of the left lung here with some thickening of the lining of the lung. This white shadow at the extreme left base is due to a little bit of fluid here. She also has a few TB shadows at the very tip of the right lung. These are just blood vessel shadows in the lung so the TB is in the upper part of the left lung and to a slight extent in the top of the right lung.

The next film was taken May 3, 1953, at Matson Memorial Hospital. This shows the collapsed lung looking somewhat greater than before, but this is due to her having gotten an air treatment a few days before so it pushes the lung down a little more. The ribs here do not appear to show any fracture, and the shadows in the lungs seem to be about the same as they did five weeks before.

This film was taken ten days after the accident, May 13, 1953, at Good Samaritan Hospital. The appearance again is much the same as before, the collapsed left lung. The shadows in the upper parts of the lung are about the same, a small amount of fluid at the lower part of the left lung.

This film was taken a month after the accident at the University TB Hospital, June 2nd, 1953. The lung has expanded a little bit because she has not

(Testimony of John E. Tuhy.)

had air probably for a few days, but the shadows in the lung are essentially the same. Sometimes the shadows look a little [103] lighter and a little darker due to the X-ray being taken differently, but careful consideration of these films does not show any new shadows in the lung, to my knowledge.

Q. Doctor, is the fluid in the lung of any significance, taken ten days after May 3rd?

A. Well, I thought not because the small amount of fluid outside the lung here was present even before the accident. This was a common occurrence with people getting air treatments to have a little bit of fluid outside the lung in the left chest, and Mrs. Walker had that from time to time both before and after the accident, and it did not seem to increase.

Q. Doctor, what was your diagnosis of Mrs. Walker's injury?

A. I believe I gave that before, but essentially that in the first place she had a pulmonary tuberculosis, pre-existing moderately advanced tuberculosis, which was considered quiescent. We did not call it healed because she had had a positive sputum in October, 1952, but it was quiescent, and that she had sustained probably a contusion or a blow on the left lung, and that the bleeding that she complained of at that time of the accident and for a number of days afterwards at Matson and at Good Samaritan Hospital, that this bleeding came in all probability from the weak area in her lung where her healing TB shadows, where—it is common in TB to have

(Testimony of John E. Tuhy.)

areas of dilated bronchial tubes and blood vessels, and bleeding can happen in those even without any injury, and in the course of an injury it may produce [104] bleeding.

Q. Doctor, did this affect her tuberculosis?

The Court: I did not hear the question.

Q. (By Mr. Peterson): Did this injury affect her tuberculosis?

A. In my opinion, it did not adversely affect the course of her tuberculosis. The reason that she was put in the hospital, the TB hospital, on June 3rd a month after the injury was that she had had these episodes of blood-spitting, and they had continued for, as I remember, about two weeks after the accident from time to time, and I thought that we should take this precaution of having her studied in the hospital where the doctors could look down the bronchia to see if they saw any bleeding and take special X-rays of the lung, test her sputum, and see if the injury had produced any adverse effect or spotting.

I saw her films at the University Hospital and had read the reports, and my conclusion would be that the injury and the bleeding did not produce any adverse effect.

Q. Doctor, do I correctly understand you that she had some scar tissue on her left lung?

A. That is correct.

Q. As a result of tuberculosis?

A. That is correct.

Q. And that a contusion to that area of the chest

(Testimony of John E. Tuhy.)

produced bleeding from that scar tissue; is that correct? A. That is my belief. [105]

Q. Doctor, do you have any opinion as to whether or not there has been any dissemination of the tuberculosis?

A. No, I think not. There is the possible danger—if a person with active TB gets hurt on the chest and bleeds, there is a danger that the blood with TB germs in it will go around the same lung or go to the opposite lung. If it is going to do that, shadows will appear in the lungs. Now, these did not show up in the X-rays so I believe no spot occurred as a result of bleeding and injury.

Q. Do I correctly understand you, doctor, that the reason you hospitalized her at the tuberculosis hospital was to follow her? A. Yes.

Q. Was that hospitalization due to injuries or this lung condition?

A. Yes, in other words, if it had not been for the injury we would have let her stay home as she had been before, let her stay home, just keep on her TB medicines, keep at bed rest, but because of injury and blood-spitting it seemed prudent and the safe thing to have her go to the hospital for these special examinations and observation.

Q. What is your bill?

The Court: For what purpose, for what time, for what period?

Q. (By Mr. Peterson): For the period of time following May 3, 1953, and the treatment of the injuries which you [106] have described.

(Testimony of John E. Tuhy.)

A. I don't remember. I believe our office furnished a complete statement from the time——

Mr. Gearin: If you find it later, Mr. Peterson, I will stipulate with regard to it.

Mr. Peterson: I will submit it, counsel.

Mr. Gearin: How much is it?

Mr. Peterson: \$157.

Mr. Gearin: We will stipulate that is reasonable but not our liability for it.

The Court: I think that is included in the \$936.13; is it not?

Mr. Peterson: I think, according to my computation that was \$137.

The Court: It is \$20 more.

Mr. Peterson: Yes. No further questions.

Cross-Examination

By Mr. Gearin:

Q. Doctor, I note here, these are your reports from your office, it is your impression under date of April, 1953, as follows, and I am going to read it, and you will correct me if I am reading it wrong:

“In my opinion, this patient sustained contusion of the lung in her automobile accident of 5-3 which does not seem to have adversely affected the pulmonary tuberculosis. From the chest [107] standpoint, she would have no permanent disability as a result of the accident.”

That is contained in your record file; is it not, doctor? A. Yes.

(Testimony of John E. Tuhy.)

Q. That is correct, is it not?

A. I believe that to be true.

Mr. Gearin: Thank you, doctor. I have nothing further, your Honor.

Mr. Peterson: No further questions. That is all.

The Court: That is all. You are now excused.

(Witness excused.) [108]

GARY WALKER

a witness called in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Gary Walker?

A. Yes, sir.

Q. How old are you, Mr. Walker?

A. Sixteen.

Q. Is your mother Dorothy S. Walker who sits here on the right? A. Yes, she is.

Mr. Bailiff, I wonder if this might be handed to the witness.

(Document presented to the witness.)

Q. Mr. Walker, do you recognize what has been marked as Plaintiff's Exhibit 1-G, I think it is? Turn it over and look at the back. A. Yes.

Q. Did you, yourself, personally take that picture? A. Yes, I did.

Q. Where was that picture taken?

(Testimony of Gary Walker.)

A. It is a picture taken at the embankment at the scene of the accident on which the car is down, it is on this embankment. [109]

Q. Is it looking downwards?

A. Yes, sir, at a slight angle.

Q. I hand you other films. (Presenting to the witness.) A. Yes, I took these.

Q. Were those other films taken by you?

A. Yes, they were.

Q. What was the date that they were taken?

A. They were taken on the 3rd.

Q. What month and what year?

A. That was, oh, the day of the accident.

Q. Can you tell us what day it was?

A. It is the 3rd. The month just slipped my mind.

The Court: Do you know what day it was taken?

Mr. Peterson: Yes, May 3, 1953.

The Witness: I was not sure of the month. It slipped my mind.

Q. Who was with you at the time the pictures were taken? A. My grandmother, Mary Fry.

Q. What is her name? A. Mary Fry.

Q. That is your grandmother? A. Yes.

Mr. Peterson: You may take the witness. We offer that in evidence, your Honor.

Mr. Gearin: I object to it, your Honor, because the witness does not know when the accident took place. He [110] was not there. It is incompetent. He went down after the accident was all over, and he takes pictures—

(Testimony of Gary Walker.)

The Court: Let me look at this picture. What about all the other pictures that are admitted to which you did not object?

Mr. Gearin: Well, those are pictures of the scene. I do not object to them, but I do not know what that one is, your Honor. I cannot tell. I do not know what that one depicts. I have never seen it before.

The Court: (To the witness): Did you take those other pictures also?

The Witness: Yes, I took them all on the same roll of film.

The Court: Where is this scene as compared to the other pictures?

The Witness: It is at the same place, except it is looking at the embankment from a slight angle.

The Court: How did you determine that this was the place of the accident?

The Witness: By the marks where the car had been from where they pulled it out.

The Court: The objection is overruled. I am going to admit it.

(Photograph, Plaintiff's Exhibit G for identification, received in evidence.)

Mr. Gearin: May I call Dr. Jones? [111]

The Court: Ladies and gentlemen of the jury, in spite of the fact the plaintiff has not yet completed her case, it was agreed earlier that the medical witnesses could go on out of order; therefore, Dr. Jones is being permitted to testify at this time. [112]

ORVILLE NOBLE JONES

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

The Court: What is your specialty, doctor?

The Witness: Orthopedic surgery, your Honor.

The Court: Are Dr. Jones' qualifications admitted?

Mr. Peterson: His qualifications are admitted.

The Court: Ladies and gentlemen of the jury, it is admitted that Dr. Jones is duly qualified to practice medicine in the State of Oregon and that he specializes in orthopedic surgery, and he is a qualified orthopedist.

Direct Examination

By Mr. Gearin:

Q. Dr. Jones, did you at my request conduct a physical examination of Mrs. Dorothy S. Walker?

A. Yes, sir, I did.

Q. What date was that, doctor?

A. May I have my notes to refresh my memory?

(Document presented to the witness.)

The examination was made on February 9, 1955.

Q. Doctor, where was that examination conducted? A. In my office.

Q. Did you during the course of your examination cause X-ray photographs to be made of this lady's person? A. Yes.

Q. Did she at that time give you a history of injury or [113] trauma? A. Yes, sir, she did.

(Testimony of Orville Noble Jones.)

Q. Will you relate to the jury what this lady told you with reference to how she got hurt?

A. Yes.

Mr. Peterson: I object to that, your Honor.

The Court: On what ground do you object?

Mr. Peterson: On the ground that it is not a history related to the witness as a treating doctor.

The Court: This is an adverse witness, Mr. Peterson. The objection is overruled.

The Witness: The history given to me was that—by the lady in question—she described injuries sustained in an automobile accident while she was driving her automobile on May 3, 1953, in the vicinity of Albany. She stated that she was forced off the highway while driving due to a large truck trailer passing another car on a curve on a hill. She stated that her car skidded and rolled down about a 60 foot embankment. She stated that the passenger riding with her was thrown out of the car and that she herself was severely shaken up within the car but that she did not fall out. She stated further that she was unconscious for some period of time. She awoke on the floor of the car, noted that she had vomited or coughed up a large amount of blood. She then made her way out of the car with great pain and difficulty due to injuries of her left chest, pelvis, right [114] hip and neck, and in addition, multiple bruises and contusions to various parts of the body. She stated she was able with difficulty to crawl up the bank to a point where she attracted the attention of passers-by, after which

(Testimony of Orville Noble Jones.)

both she and her passenger were taken to Albany Hospital. She then was transferred to Matson Memorial and later to Good Samaritan where later she was under the care of Dr. John Abele.

She explained to me the complicating feature of her being a tuberculosis patient necessitated further hospitalization at the Oregon State Tuberculosis Hospital. She stated, however, that as far as she knows the accident had not further activated her arrested lung tuberculosis. There was at the time of my examination, to her knowledge, no known extension into the right lung following repeated X-ray examinations. She stated she was in traction for some period of time at Good Samaritan, both head and neck traction, also leg traction, for which she was greatly immobilized. She complained of continuing headaches, some dizziness, ever since and stated that also she feels some impaired hearing in the left ear; that fainting spells which she had initially upon getting up have now subsided but that the dizziness and headaches have not completely subsided. She states that she carries out limited physical activity due to her tuberculosis and states that if she does very much walking she has pain related to the right hip at night. In addition, she has a very painful coccyx which she states [115] was not present prior to this accident. She further states that no treatment has helped the coccyx which is said to be displaced and will, according to her statement, require surgical excision.

(Testimony of Orville Noble Jones.)

She admits freely a prior accident about one and a half years before this accident at which time there was a fractured rib on the left, but she states that the pelvis and the back and the coccyx were not injured at the time of the prior accident. That was the history.

Q. Doctor, did you make a physical examination of her? A. Yes, sir.

Q. Will you tell the jury briefly how you made your examination before you tell us the results of it?

A. Well, the patient is prepared for physical examination by the nurse, and she is disrobed and clothed with a gown which is opened by the back for purposes of examination of the back, and then she is examined standing and then in a prone position on the examining table.

Q. Do you put the body through certain motions in the course of your examination? A. Yes.

Q. Did you make your examination with reference to the complaints that she related to you?

A. I did.

Q. Will you tell the jury, please, Dr. Jones, the results of your physical examination? [116]

A. Yes, sir. The patient was a small slightly built white female who appeared approximately of the stated age of thirty-five. She appeared in no extreme discomfort or pain at the time of my examination, but she sat guardedly on the edge of her chair apparently to protect against pressure upon the coccyx or tail bone. She stood erect with ease with a moderately good posture.

(Testimony of Orville Noble Jones.)

Q. Doctor, may I interrupt you there and ask you, in an orthopedic examination what is the significance of a person standing erect with ease and with good posture?

A. Well, in the first place, standing erect with ease is an indication that there was no pronounced persisting muscle spasm or limitation of motion of joints of the hip and back at the time of the examination, and this standing with what we consider to be a reasonable good posture would rule out any serious abnormalities of posture from either birth defects or from injury.

Q. Is that one of the things that you look for in your orthopedic examination, that is, how they stand and how they bear themselves?

A. Always.

Q. If you will continue, please, doctor.

A. There were no marked abnormalities of spinal curvature. There was one point of subjective tenderness over the mid portion of the cervical spine, that is, the neck, to the right of the spinous processes. The spinous process is a boney [117] prominence that you can feel in the center of the mid line of motion of the cervical spine.

Q. Doctor, before you leave the neck, was there any muscle spasm in the cervical spine?

A. There is no palpable muscle spasm in the cervical spine area.

Q. What is the significance of muscle spasm?

A. If there is irritation from any cause, be it injury or otherwise, in and about the joints of the

(Testimony of Orville Noble Jones.)

neck, there will be spasm of associated muscles to produce limitation of motion, and such spasm is detectable by feeling the tone of the muscles. I can only say that we know what we are feeling for. From past experience we know whether a muscle is taut or whether it is pliable.

Q. The absence of muscle spasm is indicative of what, doctor?

A. Is indicative of no irritation of the tissues surrounding the joints.

Q. All right now, did you try out the limitation of muscle throughout the cervical spine?

A. Yes, sir.

Q. Will you tell the jury how the plaintiff, that is Mrs. Walker in this case, how she acted and how she could move her cervical spine, if at all?

A. Motion of the cervical spine was carried out through the normal range, and it was without limitation and without complaint of pain. There was no involvement of either upper [118] extremity noted. There was no involvement of the upper back nor of the lower back, and there was no muscle spasm in the lumbar spine, that is, the lower spine. Motion of her lumbar spine was carried out through a normal range without pain.

Q. Doctor, when you say that the motion of the lumbar spine was carried out with normal limits without pain do you put them through certain definite motions to determine whether or not there is a limitation of motion or whether or not there will be pain?

A. Yes, sir.

(Testimony of Orville Noble Jones.)

Q. The act of unlimited or unrestricted motion with no pain is indicative of what, Dr. Jones?

A. That there is no present irritation in that part.

Q. If you will continue, please, with your examination.

A. But the pressure over the sacrum produced pain in the region of the coccyx. This is the tip end of the spine, the tail bone, terminal segments of the sacrum, and the coccyx were shortened and blunt, and pressure at the tip of the coccyx produced very marked pain subjectively.

Q. Doctor, I have noted that you have used the word "subjectively" before. Briefly speaking, what do you see when there is subjective pain?

A. Subjective in contrast to objective findings is some thing that is stated, complained of by the patient. In other words, it is a symptom rather than a sign, something that the patient tells the examiner rather than what the examiner [119] himself sees, feels, or hears.

Q. Did you see, feel, or hear anything in connection with the coccyx which would be a sign to you that there was anything wrong with the coccyx?

A. I felt that the terminal segments of the coccyx were shortened somewhat and rather blunt, comparatively speaking, but that does not necessarily mean an abnormality.

Q. Did you take any leg tests? A. Yes.

Q. What do you do when you do that, doctor?

A. Of greatest importance is the straight leg rais-

(Testimony of Orville Noble Jones.)

ing test which indicates whether or not there is continued irritation of muscles of the back, and the means of doing this test is simply to have the patient sit on the edge of the examining table, and then the examiner raises the straight legs. Now, most anyone can feel a little strain, a little pain in the muscles in back of the knee, but what we are getting after is pain referred to the back or to the hip or along the sciatic nerve, irritation, because in performing such a maneuver, we are not only placing on the muscles of the back, putting strain on it, but we are also putting a strain on the muscles of the sciatic nerve.

Q. What were the results of the leg tests?

A. Leg signs were negative with the exception of the leg raising on the right above 90 degrees which produced very slight pain in the right hip. This was a complaint [120] referable to the right hip, not to the back.

Q. Did you measure her leg?

A. Leg measurements, I did. They were equal.

Q. What is the significance of having equal leg measurements?

A. It means that there is no abnormality of posture which would be caused by one leg being shorter than the other and consequently possible alteration in the curvature of the back and prior irritation.

Q. Did you perform a neurological examination of her lower extremities?

(Testimony of Orville Noble Jones.)

A. Lower extremities, yes, sir, tested reflexes and sensation, and the neurological examination was negative. Reflexes were equal and active. Both knee jerks and ankle jerks sensation was not impaired of the lower extremities.

Q. Did you do anything with regard to motion in the left hip?

A. Yes, because of the complaint of pain in the right hip I checked the motion of both hips.

Q. Yes?

A. Motion in the left hip was carried through normal range without any limitation or pain. Motion of the right hip was limited to some degree in internal and external rotation. There was some pain on the extremes of these motions subjectively. There was, however, no limitation of flexion or of extension, adduction or abduction. That [121] is, the only limitation I noted was in rotation.

Q. In other words, in and out the hip motion was painless, and when you twisted it there was some——

A. Rotating.

Q. Rotated it.

A. Yes, then I did get some subjective distress over the right greater trochanter. That is the boney prominence over the hip.

Q. Of what portions of the body did you cause X-rays to be taken?

A. The cervical spine, lumbar spine, pelvis, and hip.

Q. When you say cervical spine, where is that?

A. That is the neck.

(Testimony of Orville Noble Jones.)

Q. And the lumbar spine is the low back?

A. Is the lower portion of the back, yes.

Q. The pelvis and the hip? A. Yes.

Q. Would your pelvis X-rays show the coccyx?

A. Yes.

Q. Was there any boney abnormality shown in any of the X-rays that you caused to be taken this year?

A. Of the coccyx?

Q. Yes. A. None.

Q. Was there any displacement or maladjustment? A. None. [122]

Q. Doctor, what comments do you have with regard to this coccyx as far as the future is concerned?

Mr. Peterson: Your Honor, I would object to that.

The Court: I think that the question should be rephrased.

Q. (By Mr. Gearin): Doctor, in connection with the condition of the coccyx that you saw—was there pain on palpation of the coccyx?

A. Yes, there was subjective pain.

Q. Subjective pain. Is that in keeping with the history that you received from this lady that you have already told us about? A. Yes, sir.

Q. What do you suggest, doctor, with regard to future treatment, if any, to alleviate the pain?

A. You ask what would be my course of treatment if I were treating the patient, Mr. Gearin?

Q. That is right.

A. Well, it is a difficult question to answer just

(Testimony of Orville Noble Jones.)

offhand. A period of how many months has elapsed now since——?

Q. Since May of 1953.

A. May of 1953. It is now nearly two years. I know that it has been suggested that excision of the coccyx may be required to relieve this lady's pain. There is a difference of opinion among orthopedic surgeons as to the efficacy of this procedure, of this measure, and I am not particularly prone to excision of the tail bone because I have found in [123] my own experience that many times the patients were not relieved to the extent that it was expected as a result, and, therefore, I will carry out conservative measures to the nth degree before I will resort—further, unless I see definite abnormality in the X-rays or evidence of fracture displacement, I am not prone to consider excision of the coccyx.

Q. What about a support, doctor, a low back support?

A. I have always used that and with marked success.

Q. From the history that you have received from Mrs. Walker, your examination and your study of the X-ray pictures, do you have an opinion as to whether or not these conditions as you now find them will or will not be permanent?

A. They should be taken one by one.

Q. All right, if you will, doctor, please.

A. No. 1: The chief complaint at the present

(Testimony of Orville Noble Jones.)

time, that of painful coccyx, the history is there, the patient's story is there, the subjective complaint is there, and I will not deny a painful coccyx. It is now some fifteen to eighteen months after the injury. The condition of painful coccyx commonly is a protruded one, is difficult to treat and is prolonged, but I never have yet seen one that did not respond in time to the proper measures and was not ultimately relieved. In other words, I do not believe that the condition is a permanent one that she will carry with her for the rest of her life. [124]

No. 2, the painful hip: This is of mild nature. There is nothing in the X-ray to suggest that there is any permanent damage to the hip joint; Therefore, I must assume that the condition is a relatively minor persisting involvement of the muscles and ligaments about the hip joint, and if it is such and in the absence of any arthritis of the hip, it will disappear in time.

Third and fourth, the neck and the lower back: The complaints are there; the objective findings are not there. I am unable to ascertain any disability at the present time as regards the neck and as regards the lower back.

Mr. Gearin: Thank you, doctor. You may inquire.

Cross-Examination

By Mr. Peterson:

Q. May I see your notes, doctor?

A. Yes.

(Testimony of Orville Noble Jones.)

Q. Doctor, have you ever removed a coccyx?

A. Have I?

Q. Yes.

A. Yes.

Q. How many coccyges have you removed?

A. I cannot tell you offhand.

Q. Can you tell us approximately how many?

A. No, I cannot tell you how many.

Q. Doctor, why did you remove a coccyx?

A. Because I felt justified in removing, due to what I [125] have explained to the jury before. There had been evidence of fracture, and there was displacement, dislocation, or malunion of the fracture of the coccyx as a result of the fracture.

Q. Then, doctor, do you remove them for displacement of a coccyx? Have you yourself removed them?

A. I have.

Q. What is the purpose of their removal?

A. The purpose of removal is to eliminate pain.

Q. Doctor, did I understand you to say that you had never seen a coccyx that had failed to respond to conservative treatment in the absence of surgery?

A. No, that was not my intended statement.

Q. Would you tell us what the intent of your statement was?

A. The intent of my statement was that in the absence of findings which I have just described, namely, deformity due to fracture or dislocation, displacement, an improper union, that I have never seen one that would not respond to conservative treatment ultimately.

(Testimony of Orville Noble Jones.)

Q. Doctor, you examined Mrs. Walker, the plaintiff here, on February 9, 1955, for the purpose of testifying; did you not? A. That is right.

Q. Doctor, you gave her an examination in your office, I believe? [126]

A. That is correct.

Q. You had X-rays taken in your office?

A. They were taken at my direction.

Q. Taken at your direction?

A. Yes. I do not have an X-ray in my office.

Q. Are you skilled in reading X-rays, doctor?

A. I beg your pardon?

Q. Are you skilled in reading X-rays?

A. I consider myself so in the field of orthopedic surgery, yes.

Q. I wonder if I might have a light box?

The Court: Which ones did you take, doctor, or don't you know?

The Witness: I can point them out, your Honor.

(X-rays produced.)

The Witness: Are all the X-rays here that I sent in?

Mr. Gearin: They are, doctor.

The Witness: Well, these are the ones.

The Court: What X-rays do you want?

Mr. Peterson: I want the X-rays that Dr. Abele testified concerning this woman's back injury.

(X-rays, Plaintiff's Exhibits 30-A, B, C, and D presented to the witness.)

(Testimony of Orville Noble Jones.)

(X-rays marked Plaintiff's Exhibits 31-A and 31-B for identification.)

Q. (By Mr. Peterson): Doctor, Exhibit 31-A is in the [127] X-ray leg box. Now, doctor, I would like to ask you if you see in the film any displacement of the coccyx? A. No, sir.

Q. You can see no displacement of the coccyx?

A. No, sir.

Q. Is it in normal alignment? A. Yes, sir.

Q. Doctor, are you familiar with the term spina bifida occulta? A. Yes, sir.

Q. Did you see any evidence of spina bifida occulta? A. Yes, sir.

Q. I beg your pardon? A. Yes.

Q. Where is that?

A. (Witness indicates on X-ray.)

Q. Doctor, what is the significance of a spina bifida occulta in a thirty-five year old woman who has had a lumbosacral sprain?

A. Relative to the lumbosacral sprain?

Q. Yes.

A. There is no significance, to my mind, whatever.

Q. No significance at all?

A. None whatsoever.

Q. Does a person, a woman who has a spina bifida occulta, have a structurally weak back?

A. She may or she may not have. She does not necessarily [128] have.

Q. Doctor, what is a lumbosacral sprain?

(Testimony of Orville Noble Jones.)

A. It is a wrenching strain or tearing, if you will, of the muscles and ligaments of the lower back involving the lowermost joint of the lumbar spine, the joint between the lumbar spine and the fixed pelvis.

Q. Doctor, is a spinal fusion a recognized surgical procedure in the treatment of severe lumbosacral sprain?

A. Is a spinal fusion a recognized procedure in the treatment of severe lumbosacral sprain?

Q. What is a spinal fusion of the lower lumbar area of the spine a treatment of?

A. Lumbosacral sprain is only one of the qualifications for spinal fusion. It itself is not a required prerequisite for spinal fusion.

Q. Doctor, why do you do spinal fusions of the lumbar area of the spine?

A. We do them because the patients have a combination of repeated—I mean a number of different attacks of the same type of pain and obvious disability in the lower back associated with inherent structural weakness at the lower back, and by that I do not necessarily mean the spina bifida that is shown here.

Q. Doctor, have you yourself done spinal fusions? A. Yes, sir, many of them.

Q. In that surgical procedure what do you do? [129]

A. It depends entirely upon what the individual condition is and how great the extent is. If we consider that the only joint involved in this weakness

(Testimony of Orville Noble Jones.)

is the lowermost joint, then our aim it to stiffen or stabilize this lowermost joint of the moving spine. That is, we speak of it as the lumbosacral joint, and in order to do so, and may I use Exhibit 31-B?

The Court: Use any exhibit you want, doctor.

The Witness: This is a lateral view of the same area. This is the joint that we were speaking of just now. It is neither practicable nor feasible to introduce a bone graft across the bodies of the vertebrae because such necessitates quite extensive procedure or entering the abdomen and cutting adjacent to the major arteries which is considered to be too dangerous; consequently, the procedure is performed in the back and the little joints on either side of the spinal column which permit this motion are curetted out of their joint cartilage and are packed in with new bone then in addition to the boney rings and spinous process, and then the lateral arches are denuded of their lining membranes down to fresh bone and are packed in with solid new bone which nowadays generally is taken from the pelvis, from the crest of the ilium over here. It used to be taken from the leg. We found this is more satisfactory.

Q. You examined Mrs. Walker on one occasion?

A. That is true.

Q. Doctor, is it your experience that a doctor, an [130] orthopedic surgeon, who treats a person following trauma and then follows through in a

(Testimony of Orville Noble Jones.)

course of treatment would be in a better position to diagnose injuries than a doctor who passes his opinion on a single examination?

A. Is better qualified to diagnose injuries?

Q. Yes, better qualified to diagnose injuries than the doctor who examines on one occasion?

A. Not necessarily so.

Q. In this instance did Mrs. Walker relate to you her course of treatment?

A. To some degree, yes.

Q. Did she relate to you that she was treated by Dr. John Abele, an orthopedic surgeon?

A. She did; she did.

Q. Are we dealing here with a question of opinions among you doctors? Is what you said just your opinion? A. With regard to what?

Q. With regard to what you—your diagnosis and suggested treatment?

A. What I said with regard to diagnosis and my suggested treatment certainly is my opinion. I feel that I am thoroughly qualified in that opinion.

Q. Doctor, did I understand you to say that in eliciting a history from this patient that she told you that she was— or that the car went over the embankment south of Albany, Oregon? [131]

A. South of Albany, Oregon.

Q. Do you know whether or not she told you south or north?

A. Mr. Peterson, it is my common practice to leave the room where the patient is being examined

(Testimony of Orville Noble Jones.)

immediately after I have completed taking a history, to go to my recording dictaphone, and to place the history on a record. Now, it is possible that in the interval of time I may have confused north and south, but it is my recollection and it is so stated on this record immediately transcribed that it was south. That is all I can say.

Q. Doctor, did she tell you that the car skidded and rolled down an embankment?

A. That is exactly what she told me.

Q. Are you sure of that, doctor? A. Yes.

Q. Upon your examination, this woman had pain in her coccyx, pain and tenderness in her coccyx; is that correct? A. That is correct.

Q. She had pain and tenderness in her right hip? A. Yes.

Q. She had pain in her low back, particularly on the right; is that not correct?

A. She complained of pain in the low back.

Q. All of those tests that you gave her were given to determine the existence of injury to her back? A. That is right. [132]

Q. It was confined exclusively to her back, to her low back, to her coccyx and the low back and not to the chest, head, or other injuries?

A. Just neck, upper back, shoulders, hips.

Q. She did not have anything wrong with her shoulders? A. No.

Q. She did not have anything wrong with her neck? A. No.

Q. She had something wrong with her right hip

(Testimony of Orville Noble Jones.)

and her coccyx? A. That is right.

Mr. Peterson: No further questions.

Redirect Examination

By Mr. Gearin:

Q. Doctor, did you feel that there was any need for Mrs. Walker to undergo spinal fusion at this time or any other time because of any condition that you found? A. A spinal fusion?

Q. Yes. A. No, sir.

Q. On the X-ray Exhibit 31-A again, I would like you, doctor, to point out, if you will please, where the three segments of the coccyx are and to illustrate and show the jury the lack of malformation which you reported.

A. The fixed portion of the sacrum which consists of several segments fused together ends at this point right here [133] where there is a joint visible. (Indicating.) Then the first or proximal segment of the coccyx is here. The second one is here, and the tiny terminal is down here (Indicating).

Q. When you line that up do you line it up with the sacrum, or do you line it up with your hips to determine whether or not it is present?

A. It is lined up with the sacrum. You see, the attitude of the patient on the X-ray table at the time that this picture was taken is tilted somewhat so that that would tend to give one a false impression, but, actually, in drawing a plumb line straight

(Testimony of Orville Noble Jones.)

through the sacrum it passes nearly directly through the coccyx. There is a little tilting off towards the right well within the range of normal limits. There are no two coccyges exactly like and none that are exactly symmetrical with your human body.

Mr. Gearin: I have nothing further, doctor.

Recross-Examination

By Mr. Peterson:

Q. Doctor, would you take your own X-ray of a similiar character and compare it with that one? Is there any difference with that one and the one you previously testified that Dr. Abele—

Mr. Gearin: He used that one too.

The Court: He used that one too. Dr. Abele used his X-rays.

Mr. Peterson: That is all. [134]

Mr. Gearin: That is all.

(Witness excused.)

Mr. Peterson: There has been referred to in the deposition of Mr. Burr what is called the driver's Sign-out Sheet that I have marked as a pre-trial exhibit which counsel has produced, and I will call Mr. Swan to identify it.

Mr. Gearin: There is no necessity. It has been identified by Mr. Swan.

The Court: It is admitted.

(Document, Driver's Sign-out Sheet, marked Plaintiff's Exhibit 10 for identification and received in evidence.)

Mr. Peterson: I think it might require some explanation, your Honor.

The Court: Very well, call Mr. Swan. [135]

T. M. SWAN

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. What is your full name?

A. Theodore M. Swan.

Q. Theodore M. Swan?

A. That is right.

Q. By whom are you employed?

A. West Coast Fast Freight, Incorporated.

Q. About how long have you been so employed?

A. About eleven years.

Q. In what capacity are you employed?

A. District Manager of the Portland area.

Q. Can you tell us just generally what your duties are?

A. Well, it is general duties of operating the company within this district, supervision of terminals and the local people working in this area, carrying on company business.

Q. Mr. Swan, are you familiar with the prac-

(Testimony of T. M. Swan.)

tices of the West Coast Fast Freight in respect to dispatch of trucks? A. Yes, quite familiar.

Q. There has been handed to you, I think, what has been marked as Plaintiff's Exhibit 10, and I will ask you what that is.

A. This is what they use as a driver's Sign-in and Sign-out [136] Sheet. It has two different—well, this particular one is a sign-out sheet. What we have, we have two different types of sheets. One is a sign-in sheet; one is a sign-out sheet. For example, if a truck came out of Seattle into the Portland District, into the Portland Terminal rather, he would sign in on one sheet showing the truck number, the trailer number, the manifest number which covers the load of freight, his point of destination, the time he arrives at the terminal, and then the driver signs it so that we would have a record of the equipment that comes in and out of the terminal at all times. This particular one here is a sign-out sheet. It shows at the top Station No. 2 which is identified for Portland. Portland station in our company is known as Station No. 2. It carries the date of 5-2-53. This the Portland sign-out sheet under the date of May 2, 1953 and May 3, 1953.

Q. Do you see on that document the signature of M. L. Burr? A. No, I do not see it on here.

Q. I believe it is on the second page.

A. Oh, yes, it is there. I do.

Q. Are you familiar with the signature of M. L. Burr?

A. No, not his personal signature, but I have no

(Testimony of T. M. Swan.)

reason to believe but what this was not his signature.

Q. Are you personally acquainted with Mr. Burr? A. Yes, I am.

Q. On the night of May 2, 1953, was M. L. Burr in your [137] employ, employ of the West Coast Fast Freight? A. Yes, he was.

Q. Was he dispatched with a truck and trailer out of Portland, Oregon?

A. According to this sign-in, sign-out sheet, yes, he was. He was dispatched out of Portland.

The Court: Is there any question about that?

Mr. Gearin: No, your Honor, there never has been.

The Court: What is the purpose of this, to show that he was working in the course of his employment?

Mr. Peterson: No, we want to show the time that the truck left Portland, Oregon, and the time that it was at Jefferson Junction. That is the purpose of it.

The Court: Will that show it?

Mr. Peterson: This establishes a leaving point.

The Witness: Yes, this will show it.

Mr. Peterson: And a leaving time.

Mr. Gearin: There has never been any dispute about that.

The Court: Is that exhibit in evidence?

Mr. Peterson: Yes, your Honor. I think it ought to be explained; otherwise, the jury won't understand what it is. That is the purpose in mind.

(Testimony of T. M. Swan.)

Mr. Gearin: We have Burr's deposition, your Honor.

The Witness: This shows that Mr. M. L. Burr signed out in Portland Station with equipment 3499, trailer No. 7900 [138] and 7901; destination Oakland, at 10:40 p.m. According to this sheet, it was May 3, 1953.

Q. (By Mr. Peterson): May 3rd?

A. According to the heading on the sheet, yes, it was May 3, 1953.

Q. Mr. Swan, do you know what time the truck and the two trailers left Portland, Oregon? Do you know of your own personal knowledge?

A. No, I do not.

Q. Can you describe the appearances of that truck and the two trailers or that tractor and two trailers?

A. Yes, I can.

Q. Would you describe it to the jury?

A. 3499 I am not familiar with the make of it, but it is a single axle tractor, single axle drive tractor. In other words, we have a front axle and one driving axle 7900 and 7901 is what we call all doubles. In other words, it was a tractor with one semi. Then there is a trailer behind that, and you have three units on this, and we simply call them trains. We call them doubles. There is lots of them running around Portland in this vicinity. Consolidated Freightways are operating a lot of them at this time. It is what we call a set of doubles.

Q. What was the color of the tractor, the upper portion?

(Testimony of T. M. Swan.)

A. The Tractor, the bodies would be black, and the cab and hood would be red. [139]

Q. What would be the appearance or color of the two trailers?

A. These two trailers, if I recall them—are no longer in the fleet—are stainless steel Freuhauf trailers.

Q. Is there any sign or indication on the front portion of either one of those trailers?

A. I would have to quote that from memory. It is a company policy that all equipment carries lettering on the front end of each trailer.

Q. What color is the lettering?

A. It is red letters with a white background.

Q. What does it say?

A. "West Coast."

Q. Where is that lettering?

A. That lettering, on our equipment the standard policy is that it is mounted at the very top of the front of the van and also on the back doors.

Q. How long is that entire rig from the front end of the tractor to the rearmost portion of the trailer, the last trailer?

A. The over-all length of this equipment is 60 feet.

Q. Mr. Swan, do you personally know whether or not on May 2nd, 1953, the equipment that you have described there was equipped with clearance lamps? A. What?

Q. Was equipped with clearance lamps?

A. I am positive of that. I say I am positive of

(Testimony of T. M. Swan.)

that [140] because all equipment goes through the shop before it leaves the terminal, for equipment inspection.

Q. Do you know whether or not it was equipped with reflectors?

A. I am confident that it was.

Q. When you say you are confident is that from your personal knowledge or do you just assume it?

A. That is from the company's procedures and policies that no equipment can go any place——

Q. Is it possible for the truck driver during the operation of that truck to discontinue the lighting of the clearance lamps?

A. I would say very doubtful when an employee that has been with the company as long as this man has and never violated a company policy.

Q. Now let me ask you, the thing I want to ask you is this: can a truck driver shut off Clearance lamps?

A. Not in our fleet, no. It is against ICC regulations. Your headlights have to be up with the——

The Court: Is it mechanically possible to do it?

The Witness: No, not under the ICC's regulations.

Mr. Peterson: I don't think you understand the question, Mr. Swan. Can a truck driver mechanically disconnect the clearance lamps whether it is against the ICC's regulations or not?

A. Oh, certainly he can reach in there and pull

(Testimony of T. M. Swan.)

the [141] wires off, something like that, but it is not connected by a separate switch.

Q. You do not have a separate switch for that?

A. Not for our rigs, no.

Q. On that rig?

A. I can't say about that, but I know our company has always complied with I.C.C. rules.

Q. Could you say as to that rig?

A. I couldn't say personally, no.

Q. Do you personally know when the truck arrived at any particular destination?

A. I couldn't say it personally. There is records to show when it arrived at destination or at different points, yes.

Q. Where are those records?

A. It is merely to show you like this. (Indicating Plaintiff's Exhibit 10.)

Q. What is a tachograph?

A. A tachograph is a mechanical device that records the speeds and revolutions of the motor.

Q. Is that part of your equipment?

A. It is not standard. It is an accessory part.

Q. Was there a tachograph on this rig?

A. I would say yes.

Q. Was there a record made of the movement of this rig [142] on the night of May 2nd and the morning of May 3rd, 1953?

A. It would record speed of equipment, revolutions of the motors, yes.

Q. Do you know where that record is?

A. No.

(Testimony of T. M. Swan.)

Q. Mr. Swan, do you know whether or not your truck driver, M. L. Burr, kept a driver's log?

A. Yes.

Q. Do you know where the driver's log is?

A. Do I know what?

Q. Do you know where the driver's log is concerning the log of May 2nd and May 3rd, 1953?

A. No, I know where it would be in our records, yes, but I couldn't say the exact location of it at this time.

Q. Have either of those records been destroyed, to your personal knowledge? A. No.

Mr. Peterson: You may have the witness.

Cross-Examination

By Mr. Gearin:

Q. How high is that sign on the first trailer?

A. Well, our trailers are twelve foot six over-all. I would say this sign, offhand actual measurement from the bottom of it would be right on 11 feet, and the top would be right on 12 feet. That is on the front end of the trailer.

Q. Mr. Swan, does the care of the tachograph and the driver's [143] log after the drivers turn them in come within your direct job? Do you have anything to do with keeping them?

A. No, nothing whatsoever.

Q. Isn't it a matter of fact that they are destroyed within ten days? A. How is that?

Q. Are not the tachograph and the driver's logs destroyed after ten days?

(Testimony of T. M. Swan.)

A. I couldn't say on that.

Q. You do not know about that one way or the other?

A. No, that is all handled in our transportation department. I am familiar with it.

Q. That is all up in Seattle, is it?

A. At the time it was. Now, it is in Oakland, California.

Mr. Gearin: That is all.

Mr. Peterson: That is all. Your Honor, I desire to read into the record as an admission part of the testimony taken of M. L. Burr.

Mr. Gearin: I think we had better have all of it, your Honor.

The Court: The entire deposition will be read into the record. Do you want to start reading at the beginning and go right straight through?

Mr. Gearin: I would like to direct the Court's attention to page 12, the question by Mr. Peterson, line 11, and the answer on lines 11, 12, and 13, which I think we [144] should take up in advance of reading the deposition, your Honor. This is page 12. Line 12, the information elicited on cross-examination by Mr. Peterson, we would ask that that be stricken.

The Court: Is there any objection?

Mr. Peterson: No objection.

The Court: It may be stricken.

Ladies and gentlemen of the jury, we are going to adjourn for the day. I desire to warn you that when you go home do not talk about this case to

anyone because both the plaintiff and the defendant are entitled to have you decide this case upon the evidence that is introduced in this courtroom and not upon any advice that you might get from some of your relatives or friends. It may very well be that they would give you good information, but the point is that there is no way for the attorney for the plaintiff or the attorney for the defendant to know what is told you, and you may get bad information that may be damaging either to the plaintiff or to the defendant; therefore, I urge you once again please do not talk about the case to anyone else. Please do not make up your minds as to how this case should be decided. You have heard only part of the testimony, and tomorrow morning you are going to hear the rest of it. Then you are going to hear from the attorneys, and the attorneys are entitled to a respectful hearing. You need not agree with them, but they are entitled to a hearing. [145] Then you are going to find what the law is from the Court. Until that time please do not make up your minds. Please return at ten o'clock tomorrow morning.

(Thereupon, the jury retired.)

(Discussion between Court and counsel.)

Mr. Peterson: I think we might dispose of one other matter while we are here. You have no objection to the Albany General Hospital records going into evidence; is that correct?

Mr. Gearin: I have not any objection to any

of the records going in, subject to his Honor's ruling that no opinion of the doctor's or of the nurses' go in or of letters of counsel. I wanted to say, your Honor, that there are numerous references to insurance in the Hospital records, and that is one thing I wanted to keep out.

Mr. Peterson: I think that would be proper, and we would not offer that, but I do offer the Albany General Hospital records in evidence, and I understand that you looked at it and said you would have no objection.

Mr. Gearin: I had no objection.

Mr. Peterson: Now, that includes the authorization by Mrs. Walker to Mr. Gearin and two other persons to examine the hospital records, the Albany Hospital records. You said you have no objection to them?

Mr. Gearin: No, just as long as you do not tell the jury who those other persons are. [146]

Mr. Peterson: If you object to it, I can offer it in evidence.

The Court: There is no question about that. Take that part out. With reference to the matters in the documents that refer to insurance, how are you going to take those out of the record?

Mr. Peterson: Your Honor, I am not going to offer in evidence the records of the TB Hospital nor the hospital records of Good Samaritan Hospital. The doctor referred to them to refresh his recollection, but I am not going to offer them in evidence.

Mr. Gearin: The Albany Hospital, to that I have no objection.

Mr. Peterson: The Albany General Hospital, and Matson Memorial Hospital?

Mr. Gearin: I have no objection to Matson.

Mr. Peterson: You have looked at it, and there were several documents.

Mr. Gearin: I looked at what you showed me.

The Court: Look them over, and if you do not have any objection we shall admit them tomorrow morning. If you do have objection, make your objection. Then I shall rule on it.

(Evening recess taken.) [147]

Morning Session, Thursday, February 24, 1955

10:00 a.m., Trial Resumed

(The following proceedings were had out of the presence of the jury:)

Mr. Peterson: Your Honor, I would want to read a part of the deposition of M. L. Burr for the purpose of offering it as an admission on the part of the defendant Burr.

The Court: How much of the deposition do you want to read?

Mr. Peterson: Not very much, your Honor. I think less than a page.

Mr. Gearin: I do not think that is fair, your Honor, to take a page out of the context.

(Discussion between Court and counsel.)

(Jury returns to the jury box.)

The Court: This was a deposition taken to perpetuate testimony, which may be somewhat different, but rule 26 (d) 4 provides: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce other parts."

Therefore, I am going to rule that if you want to introduce part of it the whole deposition will be read at this time. You may do it any time you wish.

Mr. Peterson: Very well, your Honor.

The Court: If you do not want to do that, then I understand that the other portion of the deposition which [148] was taken will be introduced anyway.

Mr. Peterson: Just so that the record shows that we do not desire to be bound by the testimony except as to the admission made by the defendant M. L. Burr.

The Court: You are never bound by the testimony of the defendant, an adverse party. It is just a matter of convenience. Do you desire to have the deposition read now, or do you want to have Mr. Gearin read the deposition in evidence?

Mr. Peterson: Let him read it.

The Court: Very well.

Mr. Peterson: May I have leave to recall Mrs. Walker?

The Court: You may. [149]

DOROTHY S. WALKER

recalled, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mrs. Walker, you have been sworn yesterday to tell the truth. You are still under oath. I assume that you understand that. A. Yes.

Q. Mrs. Walker, would you tell the jury what occurred in relation to injury on May 10, 1952, at Jake's Crawfish?

A. Yes, I was going down to Jake's with my son and a friend for dinner. In the entrance of the restaurant there was a rubber mat. When I stepped up on the mat it slid, rolled from under me, and I fell on my left side.

Q. Would you tell the jury what injuries that you received as near as you yourself know?

A. Some injury to my lung—or chest, I should say, not the lung; injury to my left—bruise to my left leg and upper left back.

Q. How long did you have pain or discomfort from those injuries?

A. I had some discomfort from the chest injury, I think, approximately two weeks, and about the same length of time for the severe discomfort from the leg injury. However, it was sore on pressure and continued to have some soreness, I think, until along in the early fall, about August perhaps. Then it completely went away. [150]

Q. Did you consult a doctor pertaining to those

(Testimony of Dorothy S. Walker.)

injuries? A. Yes, I did.

Q. Who was that doctor? A. Dr. Tegart.

Q. Do you know whether he is now living?

A. No, sir, I do not.

Mr. Peterson: Might I ask leave of the Court to ask the witness—it would really be rebuttal—with respect to the examination of Dr. Orville Noble Jones? It technically would be rebuttal.

Mr. Gearin: I have no objection at this time, your Honor.

The Court: Very well.

Q. (By Mr. Peterson): Mrs. Walker, how long did it take Dr. Orville Noble Jones to examine you on February 9, 1955?

A. You mean the Dr. Jones who was here yesterday?

Q. Yes, who testified.

A. Oh, approximately ten minutes.

Q. Did he take any notes at the time he first talked to you?

A. No, he did not. He came in this room where I was disrobed waiting for him and asked me questions, but he did not write anything down.

Q. Did he leave the room before making any notations at all? A. Yes, sir.

Q. Did you tell him that you were injured when the car in which you were riding went off the highway south of Albany? [151]

A. No, sir, I am sure I did not. I can't remember. It was a long conversation, and I couldn't possibly remember all of the exact words. I couldn't

(Testimony of Dorothy S. Walker.)

two seconds after we were completed talking. I do not think anyone could. I do not believe Dr. Jones could. It was a long conversation.

Q. Did you tell Dr. Jones that the car which you were driving skidded and rolled down an embankment?

A. I have never stated that the car rolled. I have said that I assumed that it did not turn over. I don't—I have never claimed to know what happened.

Q. But my question is did you tell Dr. Orville Noble Jones that? A. No.

Mr. Peterson: You may take the witness.

Cross-Examination

By Mr. Gearin:

Q. Mrs. Walker, do you recall where you were on August 27, 1952, if you were in Portland or not?

A. August 27th?

Q. Of 1952. You were in Portland; were you not? A. Well, sir, I would not really know.

Q. Were you outside of Multnomah County at that time?

A. Part of the time during that period I lived with my sister down in Siletz, and if you could tell me what you are referring to I can probably tell you.

Q. I am referring to an affidavit that was filed by [152] Mr. Pozzi, Mr. Peterson's partner, on August 27th wherein he verified a complaint for you

(Testimony of Dorothy S. Walker.)

on the basis that you were not within Multnomah County, Oregon, and that he had knowledge of the fact as of that date.

A. I am afraid I don't understand what you mean, Mr. Gearin.

Q. The significance, Mrs. Walker, of August 27, 1952, is this. There was on that date filed in the Circuit Court of the State of Oregon a complaint seeking the sum of \$25,000 general damages and an unstated amount of special damages by reason of the injuries which you sustained at Jake's. On that date Mr. Frank H. Pozzi, your lawyer and Mr. Peterson's partner, made an affidavit and filed it in that cause to the effect that you were not then within Multnomah County, Oregon, and that he had knowledge of the facts. Can you help us on that as to whether or not you were in Portland on that date?

A. I couldn't say whether I was in Portland on August 27th or not. If I was in Mr. Peterson's office and signed papers, I probably was; definitely I was. I know I wasn't living in Portland at that time.

Q. Mr. Pozzi was one of your lawyers at that time?

A. Well, Mr. Peterson and Mr. Pozzi are partners.

Mr. Gearin: I think that is all at this time, Mr. Peterson.

(Testimony of Dorothy S. Walker.)

Redirect Examination

By Mr. Peterson:

Q. Mrs. Walker, when was the last time when you were [153] treated by a doctor for the injury sustained on May?

The Court: I think this is going beyond the cross-examination. If you want to ask her about whether she was in Portland on that day, that is perfectly all right.

Q. (By Mr. Peterson): Mrs. Walker, can you say whether or not you were or were not in Portland, Oregon, on August 27, 1952?

A. Well, no, that has been too long ago. If I signed papers——

The Court: She does not know.

The Witness: I do not know.

Q. Did you authorize us to file a complaint for you on account of injuries sustained at that time?

A. Yes.

Mr. Peterson: That is all. Plaintiff rests, your Honor.

The Court (To Mr. Gearin): Call your witness.

Mr. Gearin: I would like, your Honor, if I may, at this time to have the clerk read with me the deposition of M. L. Burr, and I would like to call to Mr. Bishop's attention the fact that the question and answer beginning on line 11, page 12 have been stricken.

The Court: Ladies and gentlemen, I do not

know whether on any other case that you have sat on you heard any depositions read, but M. L. Burr who is a defendant resides in Washington. His testimony was taken for this trial. It was taken under courtroom conditions. In other words, [154] prior to the time that Mr. Burr began to testify he was sworn just as the witnesses here are sworn to tell the truth, and then he was interrogated by an associate of Mr. Gearin's, and he was then cross-examined by Mr. Peterson. All of his answers, as well as the questions, have been recorded, and now we are going to try to re-enact that situation here. Mr. Bishop, the clerk, will act as Mr. Burr, and Mr. Gearin will read the questions that were propounded to him by an associate of Mr. Gearin's. Mr. Peterson will ask the questions that were asked on cross-examination.

Mr. Peterson: Your Honor, I assume that the deposition is being read by the defendant, the West Coast Fast Freight, Incorporated, on behalf of West Coast Fast Freight, Incorporated, for the reason that M. L. Burr is not available as a witness. Do I correctly understand?

Mr. Gearin: It is being read on behalf of both defendants, your Honor, on the ground and for the reason that Mr. Burr cannot be here.

Mr. Peterson: Is not available as a witness?

Mr. Gearin: Yes.

(Thereupon, the deposition of Miles L. Burr taken February 12, 1954, at Seattle, Washington, and heretofore identified as Plaintiff's Pre-

trial Exhibit C for identification, was read into the record as follows): [155]

DEPOSITION OF M. L. BURR

Direct Examination

By Mr. Martin:

Q. Will you state your name please?

A. Miles L. Burr.

Q. And you live in Seattle? A. I do.

Q. Are you married? A. Yes.

Q. And how old are you? A. Pardon?

Q. How old are you? A. Thirty-eight.

Q. What is your present occupation?

A. Business agent for the Teamsters' Union, Local 174, Seattle.

Q. And how long have you worked in that capacity?

A. Since August—correction—since September 28, 1953.

Q. Prior to September 28, 1953, who were you employed by? A. West Coast Fast Freight.

Q. In what capacity? A. As a driver.

Q. How long have you had experience driving heavy truck equipment? A. Twenty years.

Q. Did you also work for the West Coast Fast Freight in [156] some capacity other than as a driver? A. Yes.

Q. What was that?

A. Various, including terminal manager, safety engineer, line dispatcher, loading foreman, and driver.

(Deposition of M. L. Burr.)

Q. When did you work as safety engineer?

A. From January, 1949, until August, 1950.

Q. Were you employed as a driver by the West Coast Fast Freight on May 2, 1953?

A. Yes, sir.

Q. What was your run at that time?

A. I was on what they call a roll and rest operation, running to and from Oakland, California, to Portland and Seattle.

Q. At that time was Portland your starting point for trips south?

A. For that particular trip, yes.

Q. Did you make a trip for the West Coast Fast Freight on May 2, 1953? A. I did.

Q. And what type of equipment were you driving on that particular trip?

A. It is known in the trade as a set of doubles or train, which consists of a tractor and two trailers.

Q. And what was your tractor number?

A. I will have to—— [157]

Q. (Interposing): I have it listed here. If you want to refresh your recollection——

A. (Interposing): 3499, I believe.

Q. Tractor 3499? A. Yes.

Q. And were the trailers 7900 and 7901?

A. That is correct.

Q. On that occasion you were carrying, I assume, a load of cargo? A. That is right.

Q. What time did you leave Portland?

(Deposition of M. L. Burr.)

A. I left Portland at approximately 11:30. The exact time—let us put it about 11:30.

Q. On what date?

A. May 2nd. That is p.m.

Q. That is May 2nd, 1953?

A. That is right.

Q. At about 11:30 p.m.?

A. That is correct.

Q. And what was your destination?

A. Oakland, California.

Q. And what route did you take?

A. 99 East.

Q. Did you make any stops on that run?

A. Yes.

Q. Where was your first stop after leaving Portland? [158] A. Cottage Grove, Oregon.

Q. What time did you arrive at Cottage Grove, Oregon?

A. Approximately 2:30. Let me see—I think that is correct. I would have to check the logs to be sure.

Q. How long a run is it from Portland to Cottage Grove? A. 147 miles.

Q. 147 miles?

A. Yes. I may be wrong on that arrival time. I would have to check the logs.

Q. Well, how long in hours generally does it take to go from Portland to Cottage Grove?

A. Oh, it would take——

Q. (Interposing): Would it take you at least three hours to drive down there? A. At least.

(Deposition of M. L. Burr.)

Q. Or longer? A. Or longer.

Q. Have you made that run a good many times so that you are familiar with the route?

A. Yes.

Q. Would it be closer to 3:30 that you arrived at Cottage Grove to go 147 miles?

A. It would be closer to 4:00: What did I say?

Q. You said at least three hours, which would make it 2:30.

A. Two-thirty would make a total of three hours. No, it would run closer to 4:00—it would be 3:30 instead of 2:30. [159]

Q. Did you make any stops at all between Portland and Cottage Grove on that occasion?

A. No.

Q. How long were you at Cottage Grove?

A. As I remembered, from the statement that I made later on in regard to this, I think there was some mechanical trouble which involved fixing a throttle arm, which consumed approximately an hour.

Q. Did you fix the throttle at Cottage Grove?

A. Yes.

Q. What was wrong with the throttle that required fixing?

A. Well, the throttle rod or the throttle lever became disengaged from the actuating arm on the fuel pump. The cotter pin came out of it, and I replaced the cotter pin with a piece of wire.

Q. Is that a common thing? A. Quite.

Q. On that equipment? A. Yes.

(Deposition of M. L. Burr.)

Q. Does that come about through ordinary wear?

A. Yes.

Q. And loosening up? A. Yes.

Q. Now from Cottage Grove where was your next stop?

A. I believe it was Roseburg, Oregon.

Q. And from there you went on to [160] Oakland? A. I went on south.

Q. And you eventually reached your destination? A. Yes, that is correct.

Q. Now, before leaving Portland on that trip did you inspect your equipment?

A. Thoroughly.

Q. And was the equipment—that is, the tractor and the trailers in good order when you left Portland?

A. In first-class condition; excellent condition.

Q. Did you have any trouble on the way other than with the throttle that you mentioned?

A. No.

Q. Was your throttle still working when you got into Cottage Grove, or was it missing, or what occasioned your stopping to fix it?

A. Well, it depends in what position your throttle arm is when it becomes disengaged. The engine will run away with itself, or you cannot get the engine to turn up. In this particular case it would not turn up. In other words, it fell off in the closed position.

Q. At what point on the trip did you first notice that the throttle was giving you any trouble?

(Deposition of M. L. Burr.)

A. You don't notice any trouble until it falls off. You have all your trouble at once in a case of that kind.

Q. Well, were you in Cottage Grove when it came to your attention? [161] A. Yes.

Q. Had you noticed it before that at all?

A. No.

Q. Now, what was the condition of the lights on this equipment?

A. The lights were in good working order, and burning.

Q. Do you remember passing South Jefferson Junction on the way from Portland to Cottage Grove?

A. I no doubt passed it, but there is no particular incident that would make me remember passing it.

Q. How far is it from Portland to South Jefferson Junction? How many miles?

A. It is seven miles north of Albany—seventy-five miles.

Q. Do you know what time you would normally go through South Jefferson Junction, leaving Portland at 11:30 at night?

A. A. Probably an hour and a half or an hour and forty minutes after leaving Portland.

Q. What time would that put you into South Jefferson Junction?

A. Eleven-thirty, an hour and a half later would be one o'clock or 1:10.

(Deposition of M. L. Burr.)

Q. Were you held up at any point on the road between Portland and Cottage Grove because of congested traffic or anything, or did you drive straight through?

A. I was not held up. There were no unusual events.

Q. Was it what you would call a normal trip?

A. Yes, quite. [162]

Q. Did you pass the scene of any accident on the road with reference to South Jefferson Junction?

A. No.

Q. Or anywhere in the vicinity of Albany?

A. No.

Q. As far as you know, did you keep on your side of the center line at all times driving south?

A. I did.

Q. Was your equipment involved in any accident on the way between Portland and Cottage Grove?

A. No, sir.

Q. Was your equipment damaged in any way?

A. No, sir.

Q. Now, after coming to Cottage Grove and repairing this throttle did you inspect your equipment again before you started out?

A. Visually you inspect your equipment every time you are on the ground. You look to see if all your lights are burning; you kick your tires to see that they are all with normal air pressure and in a sense you inspect the equipment again.

Q. Did you observe any marks on your equip-

(Deposition of M. L. Burr.)

ment or damage to your equipment at all at Cottage Grove? A. None.

Q. Then did you have occasion to inspect your equipment [163] again at Oakland?

A. Visually, yes.

Q. Before you came back?

A. Before I came back I gave it a thorough inspection on leaving Oakland.

Q. And did you observe any marks of damage to your equipment at all?

A. No; none whatsoever.

Q. A claim has been asserted, Mr. Burr, that your truck and equipment crowded another vehicle which was going north on Highway 99E in the vicinity of the South Jefferson Junction off of the road. Did you cause any other motor vehicle to go off the road at any point on that trip?

A. No, sir.

Q. As far as traffic is concerned, was there anything unusual about your trip from Portland to Cottage Grove that night?

A. Nothing unusual.

Mr. Martin: That is all.

Cross-Examination

By Mr. Peterson:

Q. Mr. Burr, your first name is Miles?

A. That is correct.

Q. What is your middle name?

A. Lincoln. [164]

(Deposition of M. L. Burr.)

Q. What is your home address here in Seattle?

A. 411 Boyleston Avenue.

Q. Did you formerly live in Portland, Oregon?

A. Never.

Q. In May of 1953, was your home in Seattle?

A. Yes.

Mr. Peterson: I think you did not desire me to read the following.

Mr. Gearin: You stipulated that it might be stricken.

Mr. Peterson: Beginning on that line, line 5?

Mr. Gearin: Yes.

Mr. Peterson: Where do you desire me to start in again?

Mr. Gearin: I think at the top of page 13 would be satisfactory.

(Thereupon, the reading of the deposition was continued as follows):

Q. (By Mr. Peterson): Mr. Burr, did I understand you to say that you left Portland, Oregon, that night at 11:30?

A. I actually moved out of town at that time.

Q. Now, when you say that you moved out of town, where did you get in the truck?

A. On company premises, Portland, Oregon.

Q. Where are the company premises that you refer to? A. 2500 Northwest 25th. [165]

Q. 2500 Northwest 25th?

A. That is right. That is the West Coast Fast Freight Terminal in Portland, Oregon.

(Deposition of M. L. Burr.)

Q. Now, when you get in the truck do you normally sign a company record, indicating the time that you depart?

A. Not exactly the time that you depart. It is the time that you report for work.

Mr. Martin: In that connection the attorneys in Portland asked me to show you the Driver's Sign-out Sheet for that day (handing document to Mr. Peterson), in case you desire to use it.

Q. (By Mr. Peterson): Mr. Burr, I hand you a document here which is not marked but has printed on the face of it "West Coast Fast Freight, Inc., 650 Hanford Street, Seattle 4, Washington," and down on the fourth line there appear the figures, "Truck No. 3499 and Trailer Nos. 7900 and 7901," and then the words, "Destination," and under the column, "Destination," the letters "Oak," and under the column "Time left," the figures "10:40," and then following that a signature, the signature purporting to be the signature of M. L. Burr.

Now, I will ask you, Mr. Burr, is what I have just read to you—does that mean that you came to work at 10:40, 20 minutes to 11:00, or does that mean that you departed in the truck from 2500 Northwest 25th Avenue at [166] the West Coast Fast Freight Terminal at 10:40?

A. The time entered in the column that you refer to, to which my signature follows, refers to the time that I reported for work. I might add that the bills and all the documents necessary to start a

(Deposition of M. L. Burr.)

trip are placed close to the time clock, and the sign-out sheets, and when I pick up those bills and punch my trip card out, I sign that time out at that time.

Q. Then that figure of 10:40 p.m., simply means the time that you reported for work?

A. That is correct.

Q. What was the usual hour that you reported for work?

A. Any time that I am called. Two hours following any time that I am called. That is in the Union agreement.

Q. Do you recall the kind of cargo that was being hauled on this truck and two trailers?

A. No, I don't recall.

Q. Approximately how long in length is the truck and the two trailers when the two trailers are hooked together and the two trailers hooked onto the truck? How long is the entire train?

A. Sixty feet.

Q. Do you recall whether or not you had a full cargo load? A. I don't recall.

Q. You don't remember the kind of cargo that you were hauling? A. No, sir. [167]

Q. Do you know what time you were destined to arrive in Oakland, California?

A. For Monday morning delivery, or second morning delivery, I should say.

Q. You mean by that, was there a specific hour that you were destined to arrive in Oakland?

A. No.

(Deposition of M. L. Burr.)

Q. Approximately how long did it normally take you to drive from Portland, Oregon, to Oakland, California?

A. The driving time involved totals approximately 20 hours—20 to 21 hours, and in between two sessions of driving at the wheel, to be in accord with the ICC requirements, you must take eight hours sleep or rest away from the equipment. It was a total of 28 or 29 hours after departure.

Q. Did you have a relief driver with you?

A. I beg your pardon?

Q. Did you have a relief driver with you?

A. No, sir.

Q. When you left Portland were you alone?

A. Yes, sir.

Q. Did you have in the truck a log—a driver's log?

A. Yes.

Q. And did you make any entries in the driver's log the following day or at any time within 24 hours from 10:40 p.m., May 2nd? [168]

A. The logs are kept on a current basis—current meaning within eight hours.

Q. And did you make any entries in the log—in the driver's log?

A. Yes, sir.

Q. When did you make the first entries?

A. We would have to look at the logs to determine that.

Q. Do you know where the driver's log is?

A. Yes, sir.

Q. Where is it?

(Deposition of M. L. Burr.)

A. In the custody of the West Coast Fast Freight, 650 Hanford, Seattle.

Mr. Peterson: I said the following words to Mr. Martin, the attorney:

“Counsel, you do not happen to have the driver’s log here?”

Mr. Martin: No, I do not. As a matter of fact, I asked them to send it up if they had it available, and they may have it in Portland.

Q. (By Mr. Peterson): Did you make entries in the driver’s log of all the stops which you made after you departed from 2500 Northwest 25th Avenue, Portland, Oregon? A. Definitely.

Q. Do you recall at any time after you departed from 2500 Northwest 25th Avenue, Portland, Oregon, stopping for coffee? [169]

A. Would you read that question please, Mr. Reporter?

(Last question read.)

A. I don’t remember the time or the point, but on a trip involving 675 miles I no doubt stopped.

Q. Do you recall whether or not you stopped for coffee at any time before you stopped at Cottage Grove? A. I did not.

Q. Before you came to work do you know what inspection, if any, was made of the truck and the trailers that you refer to?

A. By anyone other than myself?

Q. Yes.

A. I don’t know definitely of any inspection.

(Deposition of M. L. Burr.)

However, West Coast shop records would show that—would reflect what work, if any, or inspection was done.

Q. What color was the truck proper—the truck itself—not the trailers?

A. The tractor, I think we call it fire engine red.

Q. And what color was the first trailer—whatever the number was?

A. They are stainless steel, unpainted.

Q. They would be a stainless steel color, or would you call it a silver color?

A. It is unfinished stainless steel. I believe you would call it silver or metallic.

Q. Do you recall which trailer was in the lead—whether it was 7900 or 7901? [170]

A. I don't recall.

Q. Do you know whether or not the trailers were identical—that is to say, the same size and the same appearance?

A. Yes.

Q. On the front portion of the trailer was there a sign?

A. There was a sign on the upper front portion of each trailer—"West Coast."

Q. And was that printed—that is, in a printed form, or did it appear to be written out in long-hand?

A. It would have the appearance of being written out, or as you say, in longhand.

Q. And do you remember the color of the sign on the truck?

(Deposition of M. L. Burr.)

A. The letters are red, and I believe it is a white background on that particular type of sign.

Q. On the trailers are there certain lights?

A. There are minimum requirements of lights—yes.

Q. Well, I understand that there are minimum requirement of lights, but my question is, on trailer 7900 and on trailer 7901 were there lights?

A. Yes.

Q. Can you say where the lights were?

A. Front, rear and all sides.

Q. And by “front” you mean the front portion of each trailer had certain lights on?

A. Yes.

Q. And where were those lights located on the front? [171]

A. I don't remember if that particular equipment had the cluster lights in the center—in the top center of the equipment or not. It is not a requirement, and on some of the equipment that is ornamental only, but I do know that both trailers had the required lights—the top corners, and both sides.

Q. And were there any lights on the tractor portion itself? A. Yes.

Q. Would you describe where those lights were located on the tractor portion?

A. Two headlights in their normal position, and two cab lights on the front corners—they are amber on the front corners of either side of the cab.

(Deposition of M. L. Burr.)

Q. And when you say 'on either side of the cab,' were they above the level of the windshield?

A. Yes.

Q. Were they at the outermost corner of the tractor?

A. No. They were inset probably 6 or 8 inches from the corners or sides.

Q. Now, where do the lights which you have described on the trailers—where do they receive their electricity from to light them up?

A. From the battery or generator, depending on what state of operation the equipment is in.

Q. Do you hook the lines, or wires running from the trailer to the tractor up when they are hooked together? Do you [172] also have the joint wires when you join the tractor and the trailers?

A. Yes.

Q. Did you personally do that on this tractor and trailers on this night of May 2nd, 1953?

A. I don't remember whether I did it, or whether it was done by the local hostler.

Q. Do you remember who the—you refer to the local hostler?

A. I refer to the local hostler, yes.

Q. What is the name of the local hostler?

A. That is a person in the freight office who ordinarily switches equipment in the yard; hooks up tractors to trailers; spots trailers into the docks, and so on.

Q. Do you know the name of the person who was the local hostler at this terminal—

(Deposition of M. L. Burr.)

A. (Interposing): No.

Q. (Continuing): —May 2nd, 1953?

A. No, sir.

Q. And when you have two trailers coupled together, must you hook on electric wires from one trailer onto the wires of the other trailer, and then the wires of the lead trailer onto the wires of the tractor?

A. That is right. The circuit continues from the tractor clear to the back end of the trailer.

Q. Now, these lights which were on the trailers, do you know the color that they were? [173]

A. Yes.

Q. What color were they?

A. Either red or amber.

Q. Do you recall which? A. Both.

Q. Where were the amber ones located?

A. They are located on the front portion of the equipment, and/or the sides, whichever the case may be, and red faces the rear always.

Q. When you say, "the equipment," do you refer to the tractor or do you refer to the trailer?

A. To the trailers.

Q. Now, the trailers—each one of them had an amber light on the uppermost or the top corners of the trailer, is that right?

A. Would you ask it again?

(Last question read.)

A. That is correct.

(Deposition of M. L. Burr.)

Q. Did each trailer have an amber light at the lower corner of each trailer in the front?

A. On the lower corner in the front?

Q. Yes. A. No.

Q. Were there lights on the sides of the trailer?

A. There were lights on the sides of both trailers.

Q. What color were those? [174]

A. Amber.

Q. Where were they located on the sides?

A. On the top and bottom corners, on both sides.

Q. Before you got on the truck at 2500 Northwest 25th Avenue, Portland, Oregon, on the night of May 2, 1953, did you personally inspect the lights? A. Yes, sir.

Q. Was the motor running at the time that you inspected the lights?

A. It is normal to inspect them in that condition, yes, with the motor running.

Q. Do you recall whether or not you did?

A. I no doubt did.

Q. Well, do you recall whether or not you did?

A. No, sir.

Q. Do you know whether or not anyone else moved the truck before you got into it after it had been loaded for the purpose of carrying cargo to Oakland, California? A. I don't know.

Q. When you did get into it had someone already started it—in other words, was the motor running, or did you, yourself, start it?

A. I started it myself.

Q. And then if you started it yourself, did you turn on the lights? A. Yes. [175]

(Deposition of M. L. Burr.)

Q. And after you turned on the lights did you get out of the cab, or out of the tractor to look at the lights after you turned them on?

A. That is the normal practice. In this particular case I don't remember.

Q. Then is it your testimony that on the night of May 2, 1953, after you started the truck and turned the lights on, you cannot remember whether you got out of the tractor and looked at the lights that were on the trailers?

A. I inspected the equipment. Yes, I got out of the truck.

Q. Is it your testimony that you got out of the truck after you turned the lights on for the purpose of inspecting the lights on the trailers?

A. They had to be on for me to inspect them, so that the answer would be "yes."

Q. Is it your testimony that you did do that?

A. Yes.

Q. Would you tell us whether or not there was anybody present at the time that that was done?

A. I don't recall.

Q. Mr. Burr, as a matter of fact, you don't recall whether or not you actually did that or not, do you, at this time?

A. That I did what?

Q. That you got in the truck—in the tractor, and you started the motor and you turned the lights on, and that you [176] then got out of the tractor and walked around the trailers to inspect the lights. The fact is that you don't know or don't remember

(Deposition of M. L. Burr.)

whether you did that or not, isn't that a fact?

A. Could I give you the normal practice for inspecting equipment in answer to that question?

Q. No. I think that your counsel would advise you that if you do not remember your answer is that you do not remember. To say what the normal thing is does not mean that you did the normal thing. I am simply asking you if you do remember. If you don't remember, it is your duty under your oath to say that you do not remember. If you do remember, then I want to know what the fact is.

A. I don't remember.

Q. So, Mr. Burr, as a matter of fact, you cannot say when you drove the truck away from 2500 Northwest 25th Avenue in Portland, Oregon, or you cannot tell me whether all the lights on the trailers were working or not? Isn't that a fact—that you cannot testify to the fact at this moment whether they were all working, or whether they were not all working?

A. They were all working, or I would never have moved the truck or equipment. The lights on the sides of the equipment can be seen from the mirrors. Their operation can be told from the cab itself. The lights on the back of the trailers were inspected by me before departure.

Q. Now, do I understand you to say that you did turn the [177] lights on, and you got out of the tractor and inspected the lights on the rear of the trailers?

A. Yes.

(Deposition of M. L. Burr.)

Q. Can you tell us the approximate hour that was done?

A. It was done between the times—what times do I refer to—is it 10:40?

(Mr. Martin hands witness statement.)

A. That was done between 10:40 and 11:30.

Q. (By Mr. Peterson) would that show up on your driver's log?

A. The inspection of the lights?

Q. Yes. A. No, sir.

Q. Do you know the name of the person, whether a mechanic or other employee of the West Coast Fast Freight, who coupled together Trailer No. 7900 and Trailer No. 7901 to Tractor No. 3499 on the day of May 2, 1953, or any preceding day?

A. I don't know.

Q. Who normally would do that?

A. The hostler that I referred to earlier.

Q. Whose name you cannot say?

A. That is correct.

Q. Do you know whether or not there was a tachograph on Tractor No. 3499 that was covering the trip from Portland, Oregon, to Oakland, California, on the night—departing [178] on the night of May 2, 1953?

A. There is a tachograph installed in the equipment—is that what you mean?

Q. Yes. And, did it operate on that night?

A. Yes, sir.

Q. Would that accurately record the stops and the speed of Tractor No. 3499 during that trip?

(Deposition of M. L. Burr.)

A. The tachograph would not reflect the speed.

Q. What would it reflect?

A. It would reflect the fluctuations in engine RPM; also, the stops made.

Q. Do you know whether or not the tachograph recorded on Tractor 3499 on that night was kept?

A. I don't know.

Q. Do you know whether or not it was the practice or the custom of West Coast Fast Freight to keep track of recordings?

A. I understand that they retain them for a certain length of time, the limits of which I don't know.

Q. Do you know whether or not that is two weeks or two years?

A. At the present time I don't know.

Q. Can you estimate whether that is weeks or months?

A. No, sir.

Q. Do you know a West Coast Fast Freight driver by the name of Vassar?

A. Vassar?

Q. Yes, sir. [179]

A. No, sir.

Q. I will hand the same document that I previously referred to, that has your signature on it, or what purports to be your signature—I will hand it to you, and it appears to me that Tractor No. 3298 with Trailer 7657 left for Los Angeles at 11:30 p.m. on May 2, 1953, driven by a driver by the name of Vassar. Would that be incorrect in your estimation?

A. What is your question?

(Deposition of M. L. Burr)

Q. What I have related to you, or is that the fact, or do you know?

A. Well, did you state a question?

Q. Yes, I stated——

A. (Interposing): Would you repeat the question?

Q. I stated what I purported to read off the document which you hold in your hand. I will ask the reporter to read the question.

Mr. Martin: He was not there at the time. I do not see how you can ask him a question as to when somebody left.

Mr. Peterson: I will now withdraw the question and rephrase it.

Q. (By Mr. Peterson): Do you know a driver by the name of Vassar? A. No, sir.

Q. Do you know a driver by the name of E. Taylor? A. Yes. [180]

Q. Now, did you see Mr. Taylor—a driver by the name of Taylor on the night of May 2, 1953?

A. I don't recall.

Q. Do you remember Mr. Taylor's first name?

A. I am looking at this sign-out sheet, and I associate him with equipment 5478. It would be Elroy—I believe that that is his name.

Q. Did he have a relief driver on the trip that he made? A. I don't remember.

Q. What appears to be the sign-out signature besides Taylor?

A. It cannot be read. I cannot read it.

Q. Well, it appears to me that it is I. Saghati.

(Deposition of M. L. Burr.)

I don't know whether my pronunciation is correct.
Do you know a driver by that name?

A. No, sir.

Q. Or any similiar name?

A. I would have to study similarities to be sure,
but offhand I would say no.

Q. Do you recall seeing Elroy Taylor on that
evening that I asked you about? A. No, sir.

Q. Do you know what time his truck No. 5478,
left, if you know?

A. I don't know. However, the sign-out sheet
states 9:18 p.m.

Q. 9:18 p.m., would that simply mean that that
is the time [181] that Elroy Taylor reported for
work? A. I would assume so.

Q. So that truck, No. 5478, might have left at
10:00 o'clock or 10:30? A. It could be.

Q. Do you know whether or not that truck had
departed at the time that you came to work at
twenty minutes to eleven? A. I don't recall.

Q. After the equipment, that is Tractor 3499
with these two trailers hooked on, left the terminal
in Portland, that is, 2500 Northwest 25th Avenue,
what route did you take or follow?

A. I went down the water front, across the Ross
Island Bridge, out 99E through Oregon City, and
so on, which is the prescribed route.

Q. Did you make any stops before you arrived
at Oregon City? A. No, sir.

Q. Do you recall whether or not you passed any

(Deposition of M. L. Burr.)

vehicles going in the same direction that you were traveling? A. I don't recall.

Q. Do you recall whether or not you made any stops in Oregon City? A. I did not.

Q. Were the traffic lights operating at the hour that you drove through?

A. What traffic lights? [182]

Q. I will ask you that in this way: Were there any traffic lights operating in Oregon City on the night of May 2, 1953, when you drove through Oregon City with this equipment?

A. If it was not, I would have noticed the malfunctioning of the traffic light in Oregon City, and I am safe in saying that it was in operation.

Q. Do you know whether or not you made a stop in obedience to a traffic control signal which was red? A. I don't remember.

Q. Do you remember going through the City of Salem, Oregon, on that night?

A. I recall no incidents.

Q. Do you recall driving through the City of Salem, Oregon, that night?

A. No, I don't recall.

Q. You don't recall whether you took the truck route or not through Salem?

A. It is compulsory that you do.

Q. I agree with you that it is compulsory that you drive on other than the regular highway for

(Deposition of M. L. Burr.)

through motor traffic, but do you recall whether you did take the truck route, or whether you drove on the regular highway?

A. This is off the record—people cannot understand how routine a trip is. That is my way of my answer.

Q. Mr. Burr, I recognize that perfectly, and I do not [183] want to embarrass you by asking these questions.

A. There is no embarrassment whatsoever.

Mr. Martin: Just answer the question. You went through Salem, didn't you?

The Witness: Naturally.

Mr. Martin: Tell him the facts. That is what he is asking you with reference to that question.

The Witness: Well, actually he asked me if I remembered going through. That has been almost a year ago—nine months—certainly not.

Mr. Peterson: That is all I want.

Q. (By Mr. Peterson): Had you made this run on many other occasions prior to this?

A. Yes; on many occasions.

Q. And did the truck depart the usual—or was this the usual hour for the truck to depart?

A. They depart at any and all hours—twenty-four hours a day.

Q. Were you, yourself, as a truck driver normally making this run to Oakland, California?

A. Yes.

Q. When you made a night run did you normally take your lunch with you? A. No.

(Deposition of M. L. Burr.)

Q. Do you recall on the night of May 2, 1953, where you ate supper? [184]

A. I don't recall.

Q. Do you recall when you ate breakfast?

A. I don't recall.

Q. Do you recall where you ate breakfast?

A. I don't recall.

Q. Do you recall at any time on that run whether you ever stopped for coffee? A. I don't recall.

Q. Do you recall whether at any time you stopped for the purpose of doing any mechanical work except at cottage Grove?

A. The logs would reflect all that.

Q. That is, the driver's log would reflect all that? A. Yes.

Q. And you would have made the entry in there?

A. Yes, sir."

Mr. Peterson: Then I handed the photograph to the reporter and said, "Will you mark this photograph, Mr. Reporter?"

(Thereupon, photograph previously identified in the deposition as Plaintiff's Exhibit A for identification was marked Plaintiff's Exhibit 33 for identification.)

(Reading of deposition continued as follows:)

Q. (By Mr. Peterson): I hand you what has been marked as Plaintiff's Exhibit A, which is a photograph. Do you [185] recognize what appears in that photograph?

(Deposition of M. L. Burr.)

A. That is a photograph, I would say, of Highway 99E at Jefferson Junction.

Q. And as you look at that picture which direction is the camera facing when taking that picture?

A. I would say north.

Q. And do you recognize the sign which appears in the extreme right side of the photograph?

A. I see a sign pointing to Stayton—I assume it to be Oregon—and Jefferson and Scio.

Q. You have driven this Highway 99E on many occasions, have you? A. Yes, sir.

Q. And you recognize this intersection, or this junction—Jefferson Junction from this photograph?

A. I don't recognize the photograph as the Jefferson Junction, but I associate the names—the three names on the sign itself—on the signpost with the Jefferson Junction.

Q. That is to say you are familiar with the junction, aren't you? A. Fairly so.

Q. And you recognize the picture of it here?

A. That could be a composite picture. I would say no, I don't recognize it.

Q. Let me get this straight. When I handed you Plaintiff's [186] Exhibit A, I asked you if you recognized what that was, and you said, "Yes, it is Jefferson Junction."

A. And then I went on to make conditions thereof.

Q. Is it your testimony that you do recognize it, or that you don't recognize it?

(Deposition of M. L. Burr.)

A. It is similiar and somewhat familiar.

Q. Now, do you recall on the morning of May 3, 1953, the hour that you passed that intersection, or arrived at that intersection? A. No, sir.

Q. Now, would your tachograph show the exact number of miles and the exact minute that truck was at Jefferson Junction on that morning?

A. It can be computed—yes.

Q. It can be computed?

A. It can be computed, yes.

Q. It can be computed if you take a similiar—or if you would take the same truck and follow the same route from 2500 Northwest 25th Avenue southbound that you followed that night, making the same stops that you made, you would arrive there at the same moment and you could mathematically determine——

A. (Interposing): I made no stops.

Q. You mean that you never stopped for a stop sign or traffic light all the way from Portland, Oregon to Cottage Grove? [187]

A. I assumed you to mean relief stops or coffee stops.

Q. I did not mean that. I mean stops—when the vehicle comes to a stop. That is what I meant. I did not mean to infer something else.

A. Go ahead.

Q. Can it not be mathematically computed, the precise moment that the tractor which you were driving with the two trailers hooked onto it—the exact moment that it arrived at Jefferson Junction?

(Deposition of M. L. Burr.)

A. It can be computed.

Q. It can be computed on the basis of the tachograph, am I correct? A. That is correct.

Q. I believe you testified that you passed Jefferson Junction at 1:00 o'clock in the morning, or 1:10. Do I correctly remember what you testified?

A. I believe that is the hour that I stated—yes.

Q. You mean to say approximately 1:00 o'clock or ten minutes after 1:00 o'clock but you are not saying that that is the precise moment?

A. No.

Q. But that is your best estimate?

A. That is correct.

Q. At the time that you came to Jefferson Junction do you recall whether you saw any other traffic? [188]

A. I don't recall.

Q. Do you recall at any time after you left Salem, Oregon, whether or not you passed any motor vehicles going in the same direction that your equipment was going? A. I don't recall.

Q. After leaving Salem, Oregon until the time that you made a stop at Cottage Grove, Oregon, do you recall whether or not you ever passed any motor vehicles going in the same direction that you were going? A. I don't recall.

Q. Do you remember the condition of the weather at all on that night?

A. I don't remember.

Q. Do you recall whether or not you passed

(Deposition of M. L. Burr.)

other vehicles after you left Salem, Oregon, going in the opposite direction from the direction in which you were traveling?

A. I don't remember.

Q. Do you recall seeing any other trucks or trailers on the highway proceeding in the same direction as yourself on that night?

A. I don't recall.

Q. I believe you testified that you stayed on the right side of the highway all of the way from Portland, Oregon, to Cottage Grove. Now, did I understand you correctly to say that you did stay on the right side of the highway all of the way? [189]

A. It is customary for good drivers to stay on the right-hand side of the highway, unless, of course, passing other equipment or cars, and I also said that I did not remember whether or not I passed any vehicles.

Q. Then the fact is that you don't remember whether you passed any vehicles going in the same direction that you were going, and, therefore, you cannot remember whether you stayed on the right half of the highway all the way, because if you did pass other vehicles you would be on the left half of the highway isn't that the fact?

A. Mathematically that would be right—geographically, I mean.

Q. I do not mean to be argumentative about it, but you don't remember whether you passed other vehicles or not?

A. Yes, that is correct.

(Deposition of M. L. Burr.)

Q. And, therefore, you don't remember whether you were on the opposite side of the highway?

A. That is correct.

Q. Now, do I understand you to say that at Cottage Grove you inspected the lights on the tractors and trailers? A. That is right.

Q. Now, what did you do to inspect them?

A. At a stop of that nature we do what we call a visual inspection, which consists of a walk around the equipment and visually seeing if all the lights were burning.

Q. Did you look at the connections of all the lights? [190]

A. No, sir.

Q. (Continuing): —at the time that you made the inspection?

A. When I say, "No, sir," I mean it is not customary in an inspection of that sort to check the connections.

Q. Do you remember whether or not at the time that you made your inspection the truck headlights were on? A. I don't remember.

Q. Now, when you turned the front headlights on on this tractor and trailers, did that also turn all of the other lights on?

A. No. The switches are separate.

Q. Will you tell us what are commonly referred to as clearance lights?

A. Clearance lights are the lights which I described as the lights which are on the sides, the front, back and so forth.

(Deposition of M. L. Burr.)

Q. Is it possible for you to have passed a motor vehicle going in the same direction as yourself at Jefferson Junction on that morning and you not now remember it? A. It is possible.

Mr. Peterson: I have no further questions.

Redirect Examination

By Mr. Martin:

Q. Mr. Burr, this Drivers' Sign-out Sheet, under the column, "Time left," with your signature shows the hour of 10:40, and you testified that that was the time that you [191] reported for work and picked up your bills. What did you do between 10:20 and the time you left, at 11:30?

A. That time involved consisted of a thorough inspection of the equipment, and in this case probably it could have included cleaning out or wiping up the equipment, which is quite common at the start of a trip.

Q. What is the standard procedure of drivers, and yourself included, on inspection before you take equipment from the terminal at Portland?

A. It is the practice to thoroughly inspect the equipment—as a matter of fact, it is a company rule, which includes checking the oil; checking all the lights, switches, instruments, running gear, connections, and the brakes are also tested before pulling out; fifth wheel connections, and landing gear.

Q. Well, did you follow the standard procedure of inspection before leaving on this trip at 11:30?

A. Yes.

(Deposition of M. L. Burr.)

Q. On the night of May 2nd? A. Yes.

Q. Counsel asked you a number of questions, whether you were in the truck, or out of it, when the lights were turned on, and whether you inspected the equipment and its lights before you drove the vehicle out of the terminal. Did you inspect the equipment and its lights before you drove the [192] vehicle out of the terminal?

A. Yes.

Q. And you were also asked the question by other counsel as to whether or not you might have passed other cars and you said that you could not remember, and I think I asked you whether it was possible that you might have passed some car at the junction that you could not now definitely remember. My question is this: Did you stay on your right side of the highway at all times when you met any north-bound traffic? A. Yes, sir.

Q. And if you did pass any vehicle at any time it would have been on an occasion when there was no northbound traffic coming towards you?

Mr. Peterson: I object to that as leading, your Honor.

Q. (By Mr. Martin): Well, just state what you did, if you did have occasion to pass a vehicle.

A. If I had occasion to pass a vehicle I would have made a pass at a time when there was no north-bound vehicle or equipment within a dangerous or impassable distance, which is a common safety measure.

Mr. Martin: That is all.

(Deposition of M. L. Burr.)

Recross-Examination

By Mr. Peterson:

Q. But the fact is that you don't remember whether you ever passed any cars going in the same direction that you were going after you left Portland, Oregon, until you arrived at [193] Cottage Grove. Isn't that the fact?

A. That is the fact.

Mr. Gearin: Now, we object to the rest of this, your Honor, as being entirely irrelevant, immaterial, improper, prejudicial, and generally improper.

Mr. Peterson: I think it is utterly immaterial, your Honor, because it relates to the signing of the deposition.

The Court: That is all. We will take a recess.

(Jury retires for recess.)

Mr. Gearin: At this time, your Honor, since plaintiff has rested and we have had the benefit of the testimony of Mr. Burr, I move on behalf of Mr. Burr alone for an order directing the jury to return a verdict in his favor and against plaintiff on the ground and for the reason that while there is testimony in the record that there was a West Coast Fast Freight truck there, if creditable evidence, there is no testimony at all that Mr. Burr was the driver of the truck or that there were no other West Coast Fast Freight trucks there at the same time,

and I refer to the Drivers' Sign-out Sheets which indicate that there were more drivers. Mr. Vassar was there; maybe somebody else. There is no evidence, creditable or otherwise, to tie in Mr. Burr with this particular operation, and I think he should be granted a directed verdict on that basis alone. [194]

Mr. Peterson: Your Honor, I think the motion for a directed verdict is improper before defendant finishes his case, and, secondly, I think it is clear he was there at the time. According to his own testimony, he was there at 1:00 or 1:10 although he did not say it was a precise moment. He was there at 1:00 or 1:10 according to his testimony.

The Court: There is no evidence that another West Coast Fast Freight truck was not there at one o'clock, precisely at that time. There is no one else who saw this man. There is no evidence that no other trucks were operating at the same time.

Mr. Peterson: The sign-out sheet, I think, is rather clear about that, your Honor. I think it would be an invasion of the jury's province not to let the jury determine the facts.

Mr. Gearin: Your Honor, it does not reflect the time he left but reflects the time he went to work.

The Court: What about the tachograph? Are you going to have any other evidence about where that is?

Mr. Gearin: No, your Honor, I have made considerable effort to obtain the tachograph before the deposition of Mr. Burr and since, and I have been informed that those logs are all destroyed ten days following unless there has been an accident.

The Court: Are you going to have any evidence to that effect?

Mr. Gearin: No, your Honor, we just cannot find it, [195] and I have not got it. It has been destroyed. We cannot find it.

The Court: Are you going to explain the absence with an official from the company? That is what I am asking you.

Mr. Gearin: No, your Honor, they have to prove he was there. We do not have to prove he was not there. No inferences can be drawn by our lack of evidence, your Honor, because under the federal discovery rules they have as much access to that as we do. In the State Court it might be different.

The Court: You say that if he argues that you should have brought the tachograph here that that is an improper argument?

Mr. Gearin: As I understand the rule here in Federal Court, you cannot comment on the failure to produce testimony the same way I could not argue why didn't they produce Mr. Walker as a witness. I would not be entitled to ask that type of question to the jury or make that argument.

Mr. Peterson: Mr. Swan testified that the records were kept but he did not know where they were; that they would be transferred from Portland to Oakland, California, he thought. The defendant said that the driver's log was in Seattle, Washington, on the date of his deposition, February, 1954.

The Court: Mr. Swan testified that that is not in [196] his department. He does not know anything about that.

Mr. Gearin: They could have taken depositions of the officials if they wanted to produce it, your Honor. I can only give at this time to the Court my personal assurance that I have done everything I can to obtain their records.

Mr. Peterson: I have filed herein a notice to produce.

The Court: I am going to permit you to explain, if you desire, the steps that you went through in trying to obtain the tachograph.

Mr. Gearin: Thank you, your Honor.

The Court: To explain its absence, and then he can make any argument he wants on that. At the conclusion of the case you may make a motion on behalf of Mr. Burr. I do not know about that. How would you be prejudiced if I dismissed him out of the case?

Mr. Peterson: I think it would render the verdict of the jury speculative then as to the proof of the other trucks because I do not think that we have proved that other trucks were in the area, and it would leave it purely speculative as to the other trucks. I think we have proven facts from which a jury may infer that he was the driver, on the basis of his own admissions, he being there at one o'clock.

(Discussion between Court and Counsel.)

The Court: I am going to leave it up to you, Mr. Peterson. [197] You make up your mind as to how you want that done. You have the statement that he was around there at one o'clock, between 1:00 and

1:10. Is that sufficient evidence to hold him? I am going to give you that responsibility.

(Thereupon, the jury returned from recess and the following proceedings were had.)

Mr. Gearin: I would like at this time, your Honor, to introduce in evidence pre-trial Exhibit No. 27 which is a certified photostatic copy of the complaint in the Circuit Court of Multnomah County, State of Oregon, entitled "Dorothy Walker vs. Janice Holman, et al. And photographs being Nos. 26-A to E, inclusive.

The Court: What number is that complaint?

Mr. Gearin: That is 27, indicated as No. 7 in the copy of the pre-trial order which your Honor has.

The Court: Very well.

Mr. Gearin: And the photographs Nos. 26-A to E which are indicated as No. 6. The numbers were changed to accommodate the court reporter, your Honor.

The Court: Is there any objection?

Mr. Peterson: Might inquire the purpose of the first exhibit referred to?

Mr. Gearin: You mean the complaint?

Mr. Peterson: Yes.

Mr. Gearin: Do you want me to state that now?

Mr. Peterson: I would like to know the general purpose. [198]

Mr. Gearin: The purpose of it is primarily for the purpose of impeachment, your Honor. It shows that on August 27th there was filed in the State

Court a complaint which alleges that at a point three and a half months after the accident at Jake's that the plaintiff made a claim of permanent injuries to her back and permanent aggravation of a pulmonary condition of tuberculosis which is in direct conflict to her testimony under oath here, and it shows that she there was previously damaged in the sum of \$25,000, practically the same injuries which she is now seeking to recover from against us. I think it is material for that purpose.

Mr. Peterson: Your Honor, I assume that the witness has admitted everything counsel has stated, that a complaint was filed, and it was settled, and the reasons for it. I do not think it is proper.

The Court: Objection overruled. It may be admitted.

(Document, photostatic copy of complaint, previously marked Defendants' Exhibit No. 27 for identification, received in evidence.) [199]

Mr. Gearin: Call Mr. Lehr.

DUANE W. LEHR

a witness called in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Lehr?

A. 3325 Abraham Avenue, Salem, Oregon.

Q. What is your occupation?

(Testimony of Duane W. Lehr.)

A. Patrolman, City of Salem Police Department.

Q. What was your occupation May 3, 1953?

A. Deputy Sheriff, Marion County, Oregon.

Q. Did you on the date of May 3, 1953, arrive at the scene of an accident at South Jefferson Junction and U. S. Highway 99E? A. I did.

Q. What did you see when you arrived?

A. The first thing that was brought to my attention was the fact that the L.A.-Stattle truck was parked on the right-hand side facing north with its flares out.

Q. Did you see a passenger car?

A. Pardon?

Q. Did you see a passenger car there somewhere off the highway?

A. Did I see one there? One, that was all. [200]

Q. What did you do?

A. I got out of this automobile I was riding in with a friend of mine. We were coming back from Lebanon. We got out, and I saw a lady that was later identified as Dorothy Walker lying on the east shoulder.

Q. Did you talk to Mrs. Walker at that time?

A. I did.

Q. Did she say anything as to how she got to where she was?

Mr. Peterson: Objected to as leading and improper in form.

The Court: I will sustain the objection. Ask the question over again .

(Testimony of Duane W. Lehr.)

Q. (By Mr. Gearin): Did you have any conversation with Mrs. Walker? A. I did.

Q. What was the subject of your conversation with her?

A. I asked her what happened, and she said she was run off the road by a truck.

Q. What is the fact as to whether or not you made any inquiries of Mrs. Walker as to her knowledge concerning the identity of that truck?

Mr. Peterson: Objected to as leading, your Honor.

The Court: Objection overruled.

The Witness: I asked her on two different occasions repeatedly what—if she could identify the truck so we could radio ahead in some other way. Of course, I was not [201] in a radio equipped car, but we could have made contact immediately to stop a truck that was involved, and I asked her what truck it was. She didn't know. I asked her again to describe the truck, She said, "All I know it had silver on it."

Q. Was there anybody else that had been with her at that time? A. Pardon.

Q. Was there anybody that had been in the car with her in this vicinity that night? A. Yes.

Q. Do you recognize the lady sitting in the front row in the back there? A. By name, yes.

Q. Did you have a conversation with her?

A. I did.

Q. What did she tell you?

(Testimony of Duane W. Lehr.)

A. She told me it happened so fast she didn't know what happened.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. What time did you arrive, officer?

A. What time did I arrive? By the time element I would say it was approximately a quarter to two or two o'clock on May 3rd. [202]

Q. A quarter to two or two o'clock?

A. Between that time, yes.

Q. Did you make any notations at the time as to the time that you did arrive? A. I did.

Q. You did? A. Yes.

Q. You have them with you?

A. No, I do not.

Q. Were you in uniform at the time?

A. Pardon?

Q. Were you in uniform at the time?

A. No, I was not.

Q. You were riding with a friend?

A. Yes.

Q. And coming from Albany to Salem?

A. I was coming from Lebanon to Salem.

Q. Lebanon. I wonder if the aerial photographs might be shown to the witness in order that we might place the direction of the truck that he has referred to. Mr. Lehr, might I ask the numbers of those two exhibits. Would you advice me?

(Testimony of Duane W. Lehr.)

A. This is No. 11.

Q. Do you recognize the directions there?

A. According to the aerial photograph, I would say this [203] is north, south, east and west. (Indicating.)

Q. Could you mark it on there, if you recognize it, which the directions are? Turn it over on the back and mark it whatever the directions are if you recognize it.

A. It is similar although I have never seen an aerial photograph of the Jefferson Junction. It is, I would assume is similar to the clover leaf at Jefferson Junction.

The Court: Do you know what the directions are? Do you know what north is on that?

Mr. Peterson: Yes, I do.

The Witness: Let us see, according to this I imagine north is over here; is that correct?

Q. I cannot see the photograph. The jury cannot either.

(Exhibit displayed to the jury.)

Q. Referring to Exhibit No. 11, do you recognize first the clover leaf there? That is a circle highway? A. Yes.

Q. Then which direction does it appear to you to run? Examine the top of the photograph.

A. Well, that appears to be west.

Q. I think you are incorrect. It is east. The highway runs in that direction, and the photograph was taken looking east.

(Testimony of Duane W. Lehr.)

A. As I stated, I am not familiar with aerial photography in that area. [204]

Q. Well then, perhaps this other one would be better for you then, No. 12. Can you tell us which direction that is looking?

The Court: We are not going into that. You tell him which direction it is because the man never saw the aerial photograph. You are not quizzing him about it. You tell him what the directions are there.

Mr. Peterson: Very well.

Q. May I state to you, Mr. Lehr, that on No. 12—

Mr. Gearin: Mr. Peterson, may I make this suggestion? Why don't you put the Portland and the Albany directions on there. I think that may be easier because the highway may not run a true direction.

Mr. Peterson: I will mark down at the bottom with an arrow "to Albany" and at the top an arrow "to Portland." Is that satisfactory?

Mr. Gearin: Fine.

Mr. Peterson: I will do the same as to the other one.

Q. Now then, if you have these directions fixed in your mind, would you hold it up, hold up No. 11 so that the jury could see it. Where was the truck that you referred to that was stopped there?

A. The truck that I have reference to would be on the right-hand side parked approximately in this vicinity (indicating). [205]

(Testimony of Duane W. Lehr.)

Q. Did you see an automobile that was over the bank?

A. At which time? When I arrived or later?

Q. When you arrived.

A. When I arrived, no.

Q. Did you see an automobile over the bank at a later time? A. I did.

Q. Did you see any tracks where the car had gone over the bank?

A. At that particular time my first interest was injuries and so forth, and I was not making any—I was making a preliminary investigation for the injuries only.

Q. Later did you see tracks that lead off the highway down over the bank? A. Yes.

Q. Mr. Lehr, did you make any notations of the conversation that you held with Mrs. Walker here on my right, on that morning? A. I did.

Q. You did make a notation? A. I did.

Q. Do you have your notation with you?

A. I have not.

Q. You have not? A. No.

Q. Have you refreshed your recollection from that? A. Have I? [206]

Q. Yes. A. Yes.

Q. Mr. Lehr, what was her condition? Would you tell the jury what her condition was as you observed it?

A. Her condition when I observed her?

Q. Yes.

(Testimony of Duane W. Lehr.)

A. When I saw Mrs. Walker she was laying with her head to the north, feet to the south, on the east side of the shoulder, and her condition as I observed at the time, well, that was all it was, I would say.

Q. Did you observe any blood?

A. I did not.

Q. Did you observe any vomitus?

A. I did not.

Q. Did you observe the condition of her clothing?
A. I did.

Q. What kind of clothing did she have on?

A. Dark clothing.

Q. Any dirt or mud or other debris on it?

A. There was dirt, naturally, from the supposed climb up this hill that she said she made.

Q. Was there a blanket under her head?

A. Not at the time. I put one there.

Q. Did you identify yourself as being a police officer?
A. I did. [207]

Q. You told Mrs. Walker that at that time?

A. I did.

Q. Where was Miss Renfro?

A. Miss Renfro was laying down over the hill.

Q. How far in distance was that?

A. I would say approximately 20 feet or something like that.

Q. Twenty feet? A. Yes.

Q. That is down the bank?

A. Down the embankment, yes.

Q. What was her condition as you observed it?

(Testimony of Duane W. Lehr.)

A. Her condition, her head was—she was laying, oh, southwest we will say on this, the side of the embankment right at the bottom of the bank.

Q. Mr. Lehr, do I understand you to say that you asked Mrs. Walker what happened, and she said that she was forced off the highway by a truck?

A. That is right.

Q. Did you ask her what did the truck look like; is that correct?

A. That is right.

Q. Did she not tell you that it was a silver truck?

A. She said it was a silver truck—silver colored truck and that it had silver on it. That was all.

Q. Didn't you at that time say to her, "Can't you tell us more about the truck," and she said, "I am hurt. I do not [208] want to tell you any more about it," or words to that effect?

A. No.

Mr. Peterson: No further questions.

Mr. Gearin: Thank you, Mr. Lehr. That is all.

(Witness excused.) [209]

WALDEN WADDLE

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Waddle?

A. West Fir, Oregon.

Q. Where were you living in May, 1953?

A. 1125 East Seventh, Albany, Oregon.

(Testimony of Walden Waddle.)

Q. By whom were you employed on that date?

A. The A. A. Towing Company, Albany, Oregon.

Q. Were you a tow truck operator?

A. Yes.

Q. Did you go out to the scene of an accident in the early morning hours of May 3, 1953, at South Jefferson Junction? A. I did.

Q. What did you see with reference to an automobile there?

A. A Buick car down off the road on the east side of the junction.

Q. What was your purpose in going out there?

A. To take the car to Albany.

Q. Had you been given any information with regard to the condition of the car before that?

A. No.

Q. What was the condition of the car when you saw it? [210]

A. It was sitting on the bottom of the grade with two wheels on the side of the grade giving the car somewhat of a tilt. It had not tipped. The doors were closed; lights were off. The car had been taken care of by someone.

Q. Where were the keys?

A. They had been removed from the switch, and I found them in the car.

Q. What did you do to the car?

A. Due to the muddy condition of the ground, I could not drive the tow truck to the car so I inspected the car and found that I could drive it, so I drove it out near enough to the place I could get

(Testimony of Walden Waddle.)

the tow truck so that I could draw the car across the mud and hook up to the tow truck.

Q. Did you observe any blood in the front seat of the car? A. I did not.

Q. Did you get in behind the wheel?

A. I did.

Q. Was the car in drivable condition?

A. I drove it.

Q. Did you observe any damage to the car?

A. There was slight body damage. I found no mechanical damage.

Q. Then after you got it out of the mud what did you do with the car?

A. I took the car onto the south branch of the road running [211] from Jefferson towards Albany, and I raised it up, crawled underneath and checked the automatic transmission to see that there would be no harm done in towing it; found nothing wrong so I drove on to Albany with the car.

Q. Did you tow it in? A. Yes.

Q. Why did you tow it in?

A. I was there with the tow truck. I was alone. I had to tow one outfit to get both in.

Q. Will you describe the body damage that you saw to the car?

A. There was slight damage to the front bumper, a broken section on the lower part of the grille, and a crushed in place under one door.

Mr. Gearin: You may inquire.

(Testimony of Walden Waddle.)

Cross-Examination

By Mr. Peterson:

Q. How far down was this car from the level of the highway?

A. The grade there is a little over 20 feet.

Q. That would be 20 feet down from the level?

A. The vertical height.

Q. From the front of the car to the top of the highway would be a distance of 20 feet; is that correct?

A. Straight down, if you draw a line straight out from the top of the highway, dropped it down, is the distance I mean.

Q. A fall of 20 feet? [212] A. Yes.

Q. But if you took an angle, what is the distance there? A. Oh, I would say 29 feet.

Mr. Peterson: May those pictures be shown to the witness, the small ones?

(Photographs presented to the witness.)

Q. (By Mr. Peterson): Handing you those small photographs, I believe they are numbered 1-A to J, inclusive, I will ask you if that appears to be the spot where the accident occurred?

A. In that first one I see no marks to recognize.

Mr. Gearin: What is the number on the back, Mr. Waddle?

The Witness: 1-G. 1-B is in the vicinity of the accident.

(Testimony of Walden Waddle.)

The Court: What is it that you want to know, Mr. Peterson?

Mr. Peterson: I want to know if he saw any car tracks immediately south of the highway sign—when you were there.

The Witness: Down the grade where the car traveled?

Q. Wherever off the highway and down the grade.

A. I did not work on top of the grade.

Q. You were not on top of the grade?

A. No.

Q. Were there tracks or were there not tracks when you were there?

Mr. Gearin: He said he was not there.

The Witness: I was not on top of the [213] grade.

Q. (By Mr. Peterson): You did not go on top of the grade? A. I did not.

Q. Your tow truck was down in the bank in the field or cut or ditch or whatever you want to call it?

A. No, I had to drive the car from where it was out to the place I could get the tow truck, get it close enough to the tow truck for my cables to reach.

Q. Can you tell the jury how far that car was from the center of the highway which goes east at that point?

A. It was not so far north as this highway sign shows here (indicating).

(Testimony of Walden Waddle.)

Q. Tell the jury about how far that is in distance?

A. No, I would rather not guess at the distance.

Q. Less than 100 feet?

A. It was more than 100 feet from the junction to where the car was.

Q. Would you say it is less than 200 feet?

A. I would not like to make a statement as to the exact distance.

Q. Mr. Waddle, when you got there the car was nosed down into the rocks; isn't that right?

A. No.

Q. What was it nosed down into?

A. It was not nosed down.

Q. Could you tell what had stopped its forward progress?

A. The brakes and wheels, the sliding of the wheels. [214]

Q. There was damage to the front part?

A. Slight damage.

Q. There was damage to the grille, to the front bumper?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Did you say one fender?

A. Under one door.

Q. Under one door. Was there an indentation or a bent place?

A. Yes.

Q. Was that rather extensive?

A. No.

Q. Was the bank rocky?

A. Not very many rocks there. There was some small rock.

(Testimony of Walden Waddle.)

Q. You were behind the wheel, were you?

A. Of the Buick?

Q. Yes. A. I drove it.

Q. Was the steering wheel bent?

A. I did not observe that it was.

Mr. Peterson: No further questions.

Mr. Gearin: That is all, sir.

(Witness excused.) [215]

A. C. PAYNE

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Payne, where do you live?

A. Eugene, Oregon.

Q. What is your occupation?

A. Truck service business.

Q. Do you have one of those big truck service lots on the highway down there? A. I do.

Q. What highway is that?

A. It is on Highway 99 East.

Q. Do you service all trucks or trucks of a particular line?

A. All kinds of trucks, yes.

Q. Do you service all of the trucks of West Coast Fast Freight? A. I do.

Q. North and southbound? A. I do, yes.

Q. Do all of those pass through Eugene?

(Testimony of A. C. Payne.)

A. Yes, they do.

Q. Past your station? A. They do. [216]

Q. Have you checked your records of May 3, 1953, to determine the existence of any records indicating work performed to any loading equipment of West Coast Fast Freight? A. I have.

Q. Will you tell the jury the results of your search?

A. I couldn't find anything at all on any piece of equipment in that twenty-four hours.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. Are you a truck mechanic yourself, Mr. Payne? A. No, I operate the place.

Q. You operate, you supervise your place?

A. Yes.

Q. Have you been a truck mechanic?

A. I have.

Q. Have you been a truck driver?

A. I have.

Q. Are you familiar with the kind of rigs or tractors and trailers operated by the West Coast Fast Freight? A. I am.

Q. Are they all uniform in size?

A. Very nearly, yes.

Q. Are they uniform in color?

A. Yes. [217]

(Testimony of A. C. Payne.)

Q. What color is that?

A. Red with aluminum trailers.

Q. With aluminum trailers? A. Yes.

Q. Are there any signs on them? A. Yes.

Q. What are the signs?

A. "West Coast" across the front and across the back of the box.

Q. Mr. Payne, did I understand you to say that you had checked the records at your Eugene service department? A. I have.

Q. Do you still service the trucks of West Coast Fast Freight? A. I do.

Q. Did any trucks stop there the preceding day?

A. I don't know.

Q. Or the day after?

A. I don't know.

Q. Did any trucks stop there on May 2nd or 3rd, the night of this accident?

A. On May 3rd, yes.

Q. What time did they stop?

A. I don't keep any record of time.

Q. Do you know whether it would be in the morning, daylight hours, or darkness?

A. No, I do not. [218]

Q. Do you know whether or not there is a separate switch on—whether the truck driver can switch off the clearance lights on the kind of rigs on West Coast Fast Freight? A. No.

Mr. Gearin: I object to that. It must be tied into this particular equipment, and we had a set of doubles or a train.

(Testimony of A. C. Payne.)

The Court: I think it is going far beyond the direct examination. The only questions asked this witness on direct examination were about the records. If you want to inquire about that, it is satisfactory.

Q. (By Mr. Peterson): When you say that you checked the records did I understand you correctly to say that you checked the records to find out if there was any wiring service or electrical service rendered? A. That is right, yes.

Q. But there may have been other kind of work but not wiring?

A. There was to the fuel and oil.

Mr. Gearin: I did not hear that last.

The Witness: There was fuel and oil on the——

Q. (By Mr. Peterson): Do you know whether or not you furnished fuel and oil to the tractor pulling trailers No. 7900 and 7901 that night?

A. I do not.

Mr. Peterson: No other questions. [219]

Mr. Gearin: That is all. Thank you.

(Witness excused.) [220]

WILLIAM T. EWING

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Ewing, what was your occupation in May, 1953?

A. Oregon State Police Officer.

Q. I understand you are in the insurance business now? A. Yes, I am.

Q. On that date did you go out to the scene of an accident on South Jefferson Junction in the early morning hours? A. Yes, I did.

Q. How did you hear about it?

A. Well, I was gasing up my patrol car at the Albany shops, which is close to Highway 99, and an L.A.-Seattle truck stopped out on the highway, and the driver got out and told me there was a car over the bank.

Q. What kind of a truck was that? Can you describe that? Was that a big truck or a small truck? A. The L.A.-Seattle?

Q. Yes.

A. It was a truck trailer cab-over.

Q. Was it a big rig? A. Yes.

Q. What was its color? Was it a light color or a dark [221] color?

A. The truck is green. The cab is green, and the box was silver.

Q. Did you go out to the scene where you had been told there had been an accident?

(Testimony of William T. Ewing.)

A. Yes, I did.

Q. You were familiar, you had been, had patrolled that night, had you? A. Yes.

Q. For how long a period of time?

A. I started my patrol at 5:00 p.m., and it was to last until 2:00 a.m.

Q. When you were gasing up were you at the end of your line?

A. Yes, it was 1:50.

Q. What highway did you patrol?

A. 99 South out of Albany.

Q. At any time while you were on patrol that night did you observe any truck with improper clearance lights or other lights? A. No.

Q. What would you have done had you observed a truck with improper clearance lights?

A. Well, I would have stopped the truck.

Q. Did you stop any trucks that night?

A. Not with lights, if I remember [222] correctly.

Q. How long a period of time had you been on patrol on Highway 99?

A. Previous to this date?

Q. Yes, what I am getting at is, was this a new assignment for you?

A. About one month I had been on there.

Q. What were your hours?

A. Five p.m. to two a.m.

Q. Can you tell us generally, and briefly if you will, please, Mr. Ewing, the number of big trucks

(Testimony of William T. Ewing.)

that are on the highway in that stretch during those hours?

A. I couldn't begin to estimate the number. There are lots of them.

Q. You know what we talk about when we say the box; that is the trailer. Do you frequently or do you infrequently see aluminum-colored boxes or trailers on highways?

A. Most always they are aluminum, big rigs.

Q. I will ask you what is the fact as to the prominence of red as being a color that is quite commonly found on a tractor part of heavy trucks

A. There are several different companies who have red colored tractors.

Q. On this night can you tell us what the weather was?

A. The pavement was dry, and it was cloudy.

Q. Have you seen West Coast Fast Freight trucks on that [223] highway at night?

A. Yes, many times.

Q. I will ask you, officer, and I want you to wait a moment if you will, please, before you answer. I will ask you if in the vicinity of South Jefferson Junction on an overcast night, if it is possible to see the words "West Coast" on the front of the trailer of one of our rigs unless the same is illuminated by lights on the cab?

Mr. Peterson: I object to that.

The Court: You have not shown any special competence of this person to render that opinion.

Q. (By Mr. Gearin): Have you observed our trucks at night? A. Yes.

(Testimony of William T. Ewing.)

Q. Have you seen the words "West Coast" on the front of the trailer when the sign has not been illuminated by a light on the cab?

A. Not unless I would be absolutely looking for it.

Mr. Peterson: I move to strike it, your Honor.

The Court: Have you made any tests yourself to determine whether you can see the words "West Coast" on the front of the box when you are driving in the opposite direction?

The Witness: I might explain that this way. There has been occasion when we would receive a call on the radio to stop a West Coast truck and advise him that he has left his bills of lading or something of that kind at his station, and at night-time when you see a truck coming, as it gets near [224] your headlights hit it. You look up to see if it was a West Coast truck, and I have done that.

The Court: What do you mean? Would you have to put your head forward towards the windshield to look up?

The Witness: Yes.

The Court: If you are sitting in the regular position you have not been able to see it?

The Witness: Yes; correct.

The Court: What kind of a car were you driving?

The Witness: 1952 Ford.

Q. (By Mr. Gearin): Do you recognize this lady who is sitting here at the counsel table?

(Testimony of William T. Ewing.)

A. Only by name.

Q. Did you have a talk with her when you got out there? A. I inquired——

Q. You just answer the question yes or no.

A. Yes, pardon me.

Q. Did you talk to her at any other place?

A. Yes.

Q. Other than at the scene of the accident?

A. Yes, I did.

Q. Where was that?

A. The Albany General Hospital.

Q. What was her condition, physical condition, with regard to her being rational or not at the time you talked to her out at the scene on the highway and at the hospital? [225]

A. I found her to be rational.

Q. What is the fact as to whether or not she had the appearance of being in full possession of her mental faculties?

A. I don't understand that question.

Q. Did she appear to know what was going on?

A. Yes, she did.

Q. Will you relate the conversations that you had with Mrs. Walker both at the scene of the accident and at the hospital?

The Court: First take the scene of the accident.

The Witness: At the scene I inquired briefly as to her injuries, if there were any broken bones, lacerations, anything where I could have given first aid, and didn't find or observe any physical disabili-

(Testimony of William T. Ewing.)

ties there. At the hospital I inquired as to the description of the truck, of Mrs. Walker.

Q. What did she tell you?

A. She told me it was a red truck.

Q. Did you question her about the identity of the truck? A. Yes, I did.

Q. You tell the jury what you said to her and what she said to you.

A. I told her there were many red trucks on the road and elaborated quite a lot on different types of trucks and different companies who operated red trucks to try to determine the exact company involved.

Q. What did she say? [226]

A. All she could say was that it was a red truck, and didn't help me any more on that.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. Mr. Ewing, by whom are you presently employed?

A. The Oregon Automobile Insurance Company.

Q. In what capacity? A. Investigator.

Q. That is, you investigate accidents?

A. Yes.

Q. Mr. Ewing, when were your services terminated with the Oregon State Police?

A. September 14, 1954.

Q. Mr. Ewing, you did not make a report of your investigation of this accident, did you?

(Testimony of William T. Ewing.)

A. No.

Q. Under your duties as a state policeman, are you not required to make a report of accidents that you investigate? A. Not always.

Q. Who was your partner at the time that you investigated this accident?

A. There was no other patrolman in the car with me.

Q. Did you meet another state policeman at the scene? A. Yes.

Q. What was his name? [227]

A. Jim Hamer.

Q. Where does Mr. Hamer live?

A. In Salem.

Q. Did Mr. Hamer make a report?

A. I don't believe so.

Q. Mr. Ewing, did you—when you arrived at the scene did you see Mr. Duane Lehr?

A. Yes, I did.

Q. What time did you arrive?

A. 2:05 a.m.

Q. At 2:05 a.m.? A. Yes.

Q. You were gasing up in Albany when, you say, a L. A.-Seattle truck driver told you that there was a car over the bank; is that correct?

A. Yes, it is.

Q. Did the truck driver tell you he had seen the lights of the car over the bank?

A. I don't remember whether he said that or not.

Q. Mr. Ewing, that L. A.-Seattle truck was green in color? A. Yes.

(Testimony of William T. Ewing.)

Q. At five minutes after two you were then off duty, were you? A. No. [228]

Q. Well, your shift was from five o'clock at night until two in the morning; is that right?

A. Yes.

Q. So that at five minutes after two you were off duty? A. No.

Q. The allotted time for you to work expired at two o'clock?

A. For that particular patrol.

Q. For that particular patrol. Now, Mr. Ewing, when you arrived at the scene you saw Dorothy Walker. Where was she at that time?

A. Laying on the shoulder.

Q. What was her physical appearance?

A. Well, I don't remember, but what do you mean by physical appearance?

Q. Can you tell us how she was dressed?

A. No, I couldn't.

Q. Could you tell us whether there was mud on her clothing? A. No.

Q. Can you tell us whether or not there was vomitus on her clothing?

A. I did not see any vomiting.

Q. Can you tell us whether or not there was blood on her clothing?

A. I did not see any blood.

Q. Did you look for it? [229] A. Yes.

Q. Now, Mr. Ewing, do I understand that you had a conversation with her at that time?

A. Very briefly.

(Testimony of William T. Ewing.)

Q. Did you ask her what kind of a truck it was or what happened? A. Not at that time.

Q. Did she appear to be in pain?

A. I don't remember.

Q. Where was the other lady?

A. She was laying at the bottom of the hill. That was down——

Q. You also went down to see her?

A. Yes, I did.

Q. Did you have a conversation with her at that time? A. Yes.

Q. Now, then, you had another conversation over at the Albany General Hospital? A. Yes.

Q. What time did you arrive there?

A. Approximately 3:00 a.m., maybe 3:15.

Q. At that time you had a further conversation with Dorothy Walker? A. Yes, I did.

Q. Was she on a stretcher? A. Yes. [230]

Q. Was Emily Renfro also on a stretcher?

A. Yes, she was.

Q. Were they both in that hospital room?

A. The emergency room.

Q. The emergency ward? A. Yes.

Q. How far apart were the two stretchers?

A. Well, as I remember, they were right together, very close.

Q. Who else was in the room at the time you had a conversation?

A. At different times there would be a nurse. There was two nurses, I believe at different times, and Dr. Bain most of the time.

(Testimony of William T. Ewing.)

Q. Mr. Ewing, at that time and place while Dorothy Walker was lying on a stretcher and Emily Renfro was lying on an adjacent stretcher just a few feet apart in the same room did you ever at that time ask Dorothy Walker what truck it was?

A. Yes, I did.

Q. Did she not say to you, "It was a West Coast truck, and it had a red cab and a silver trailer, and if you will hurry you can catch it?" Did she not ask you that? A. No.

Q. And at that time and place did you not say to her, "Well, we have to be sure. There are other companies that have similar trucks." Do you recall saying that? A. No, I do not. [231]

Q. Do you recall saying to her, "We have got to be sure. Are you sure it isn't——?"

Mr. Gearin: We object to this, your Honor. Proper foundation for impeachment has not been laid.

The Court: Go ahead.

Q. (By Mr. Peterson): Did you not at that time and place say, "Are you sure it was not an Exley truck?"

A. No, I don't remember saying that.

Q. At that time you were familiar with the Exley truck line; were you not? A. Very much.

Q. Do I understand you to say that you do not recall saying that or you didn't say it?

A. What question was that?

Q. You said to Dorothy Walker, "Are you sure it was not an Exley truck?"

(Testimony of William T. Ewing.)

A. I don't remember saying that.

Q. You don't remember saying that?

A. No.

Q. You are not saying that you did not say it?

A. No.

Q. Did she not say to you then, "No, it was a West Coast truck"? Do you recall her saying that to you? A. No.

Q. You are not saying she did not say it, are you? [232]

A. I don't remember her saying it. No, she didn't say it to me.

Q. You are saying now that she did not say it?

A. Yes.

Q. And not that you do not remember whether she said it?

The Court: He has answered the question.

Mr. Peterson: No further questions.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Gearin: Defendants and each of them rest, your Honor. [233]

DOROTHY S. WALKER

recalled for rebuttal testimony, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mrs. Walker, did you recognize this gentleman who last testified here, William T. Ewing?

A. I don't recognize his face, no. I know that he was an officer that was at the scene of the accident. He is familiar. I would not have been able to pick him out of a crowd.

Q. Did you recognize the other gentleman who has been identified and calls himself Duane Lehr?

A. No, I don't recall Mr. Lehr.

Q. Did someone put a blanket under your head at the scene of the accident? A. Yes, sir.

Q. Where were you lying at that time?

A. Lying beside the road.

Q. Would you relate what conversation, if any, was held at that time, what questions were asked you by this person and what your answers were to him?

Mr. Gearin: We will object to "him," your Honor; entirely self-serving what she said to someone, and undescribed person at the scene of the accident.

The Court: Objection sustained.

Q. (By Mr. Peterson): Did anyone identify themselves as [234] being a deputy sheriff at the scene of the accident?

A. No, if—may I refer to Mr. Lehr's testimony?

Mr. Peterson: The Court has said you may not.

(Testimony of Dorothy S. Walker.)

A. Oh, if anyone did I did not understand it. I do not think he did: I could say what——

The Court: That is all. Objection sustained. There is no question about it now.

Q. (By Mr. Peterson): Did anyone identify themselves to you——

The Court: She has already answered, Mr. Peterson, that nobody did.

Mr. Peterson: I would like to ask her——

The Court: This is a self-serving declaration, and you are putting words in her mouth. I am going to sustain the objection. Change the subject.

Q. (By Mr. Peterson): Mrs. Walker, would you relate what conversation, if any, or conversations were held at the Albany General Hospital in your presence and in the presence of Emily Renfro after the accident described? A. Yes.

Mr. Gearin: I would like to ask who was present at that time. If it is a state police officer that she can identify, I haven't any objection.

Q. (By Mr. Peterson): Can you identify Mr. William T. Ewing as being the person who talked to you, the state policeman who talked to you at the hospital room at the Albany General Hospital after the accident? A. Yes, I believe he is.

Q. Would you relate the conversation that was held with you at that time and place?

A. Yes, the police officer brought my purse in from the accident. He had found it in the car or somewhere near the car, I couldn't say where, and he asked me then what happened, and I told him

(Testimony of Dorothy S. Walker.)

exactly as far as I knew. He asked me what kind of a truck it was, and I told him. I told him the color and that it was a West Coast truck and if he would hurry he could stop it. He said that, "We must be sure. We must be very sure that it is a West Coast, that you have the correct name of the truck. Do you think that it could have been——" then he explained to me there was lots of other red and silver trucks—"Do you think it could have been Exley or," I believe he mentioned Inland, some of the others. I said, "I know that there are other red and silver trucks, but I saw West Coast so I know it was a West Coast truck." And he said, well, something to the effect that, "Don't worry, we will take care of it."

Q. Did you hear any conversation in your presence between the police officer and any other person immediately afterwards? A. Yes, I did.

Q. What was that conversation? [236]

Mr. Gearin: We will object to that; no foundation has been laid for that, your Honor. It would be hearsay.

The Court: What is the purpose?

Mr. Peterson: He brought this up, a certain portion of the conversation. I want to show all of it.

Mr. Gearin: My conversation only related to the conversation he had with the plaintiff.

The Court: The objection is sustained.

Mr. Peterson: Nothing further.

Mr. Gearin: I have no further questions.

Mr. Peterson: Plaintiff rests.

Mr. Gearin: I would like to take up a legal matter before the Court.

The Court: Ladies and gentlemen of the jury, we will recess now until two o'clock at which time you will hear the arguments of counsel, and thereafter you will hear the instructions of the Court.

Let me urge you once again, please do not make up your minds until you have heard the arguments of counsel and the instructions of the Court, and do not talk about this case to anyone else even among yourselves. You are now excused until two o'clock.

(Jury retires for noon recess.)

Mr. Gearin: At this time, if the Court please, the defendants and each of them jointly and severally move the [237] Court for an order directing the jury to return a verdict in favor of the defendants and each of them and against the plaintiff on the ground and for the reason that there is no satisfactory evidence that the defendants or either of them are guilty of negligence in any particular charged or of any act or omission on the part of the defendants or either of them constituting the proximate cause of the plaintiff's injury and damage.

I particularly point out that the motion is made on behalf of an individual, Mr. Burr, who we submit at this time is not properly identified as being the operator of the truck who forced the plaintiff off the road.

The Court: Do you want Mr. Burr in the case?

Mr. Peterson: I think he is properly in the case, your Honor.

The Court: The motions are denied.

Mr. Peterson: I would like to make an offer of proof.

DOROTHY S. WALKER

recalled, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mrs. Walker, at the scene of the accident did anyone identify himself as being a state police officer? A. No.

Q. Was anyone at the scene of the accident dressed in a state police officer's uniform, to your knowledge? [238] A. Yes.

Q. Was that person the person who testified here? A. I believe it was Mr. Ewing, yes.

Q. Mr. William T. Ewing? A. Yes.

Q. Mrs. Walker, when did you give birth to the child, your last born child?

A. October 19, 1954.

Q. Was the child earlier than the nine month period of gestation? A. Yes.

Q. What period of gestation was there?

A. About seven and a half months.

Q. Who was the doctor at the time?

A. Dr. George Lage.

Q. Is he an obstetrician? A. Yes.

Q. Was there any inducement for earlier premature childbirth? A. Yes.

Q. Do you know the reason for that?

Mr. Gearin: We object on the grounds of competency.

The Court: The objection is sustained, but let him make his offer.

(Testimony of Dorothy S. Walker.)

Q. (By Mr. Peterson): Do you know the reason for it?

The Witness: Do I answer?

The Court: Yes. [239]

The Witness: Yes, because—shall I say what Dr. Lage told me; is that what you want or——?

The Court: You are not a physician, are you?

The Witness: No, no, sir.

The Court: I told you, Mr. Peterson, that we will listen to the obstetrician's testimony if you bring him up here, but I do not think this witness is competent to testify.

Mr. Peterson: I will withdraw that question, your Honor. That is as far as I can go. I want to ask one other question.

Q. Did you have any difficulty with your back or right hip or coccyx during pregnancy?

A. Definitely, yes.

Q. Do you know the reason or relationship of the pregnancy with your difficulty with your back and coccyx and right hip? A. Yes.

Q. What is the relationship?

Mr. Gearin: We object on the grounds of competency.

The Court: She may answer.

The Witness: Well, as the baby got heavier and the pressure increased on the bone structure in that region it became very painful or sore.

Q. (By Mr. Peterson): Could you wear a back support for it?

(Testimony of Dorothy S. Walker.)

A. I couldn't wear a back support because I could not have tightness over my tummy.

Q. Did any doctor prescribe a back support for you? [240]

A. Dr. Abele told me to wear a tight girdle. That was before I was pregnant. I couldn't wear a girdle because of the pregnancy.

Mr. Peterson: No further questions.

Cross-Examination

By Mr. Gearin:

Q. Are you wearing a girdle now?

A. Yes, sir.

Q. Are you wearing a back support now?

A. No, just a girdle.

Mr. Gearin: That is all.

The Court: I am going to reject your offer of proof. I do not know what was the purpose of asking whether there was an officer at the scene of the accident. The questions to which I objected were questions for conversations with an unidentified person, not an officer who testified here, but they referred apparently to the testimony of the officer who was not on duty.

(Discussion.)

(Noon recess taken.) [241]

Afternoon Session, 2:00 P.M., Trial Resumed.

(Counsel for the respective parties having presented their arguments to the jury, the Court thereupon instructed the jury as follows:) [242]

The Court: Ladies and gentlemen of the jury:

You have now heard all of the evidence and the arguments of the attorneys in the case of Dorothy S. Walker, plaintiff, vs. West Coast Fast Freight and M. L. Burr, defendants. It is now my privilege and duty to lay down for you the rules of law which you are to follow in deciding the questions of fact to be submitted to you. It is your duty as jurors to follow the law as stated in my instructions and to apply the law so given to the facts as you find them in the evidence before you without bias, prejudice, or sympathy for or against either the plaintiff or the defendants. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in my instructions.

You have heard the arguments of the attorneys. As they themselves have told you, what an attorney says either during the course of the trial or in his argument to you or to me is not evidence. The attorney is not under oath, and his duty is a partisan one to his client. If an attorney has related what he regards to be evidence and it disagrees with your memory, you are to take your own memory of the

testimony and not that of an attorney. The particular purpose of an argument to a jury is to suggest [243] inferences and deductions which the particular attorney believes can be drawn from the evidence.

While you may follow the inferences and deductions that are made to you by a particular attorney if they seem reasonable and logical to you, you are not bound to do so.

It is the duty of the Court to admonish the attorney who out of zeal for his cause does something which is not in keeping with the rules of evidence or the procedure. You are to draw no inference against a side to whom an admonition of the Court might have been addressed during the trial of this case.

A judge of the Federal Court has the privilege of commenting on the evidence. If I do so in this case I shall tell you what portion of my instructions constitute comment.

The function of a judge is different from that of either the jury or the attorneys in a trial of a case. The judge's function is to lay down the rules of law that govern the trial and to see that the trial is free from error. The judge must necessarily rule upon questions of law throughout the case. These rulings on questions of law have no relation, so far as you are concerned, to questions of fact, and if any evidence was ruled out or stricken out then it is your duty to pay no attention to such evidence, and if evidence was not admitted you are not to speculate upon what might have been proved if the ruling had

been otherwise [244] and the evidence had been admitted.

If any of you know or think that you know by any expressions or words of mine what I think about this case and how it should be decided, you are not bound by my opinion on that subject. You are the sole and exclusive judges of all questions of fact and the credibility of all witnesses. However, I will lay down certain rules of law to govern you in your determination of the facts, and these rules are final and binding upon you whether you agree with them or not.

You are to decide the questions that are to be propounded to you solely on the basis of the evidence that has been introduced at this trial. If you have acquired or think you have acquired any knowledge or information concerning any issue involved in this action from any source other than the evidence, you are not to convey such information to any other juror, and you are not to consider it yourself.

This case is based upon a claim of negligence. Plaintiff claims that the defendants were guilty of negligence in a number of respects which I shall outline for you, and she claims that such negligence forced her car off the highway and into a ditch as a result of which she contends she was seriously and painfully injured. The defendants have denied these allegations; therefore, your first inquiry must be: Was Mr. Burr operating a West Coast Fast Freight truck at the scene of the accident at the time Mrs. Walker was forced [245] off the road? Of course, if Mr. Burr was somewhere else and some other truck

was involved in the incident described by Mrs. Walker, your deliberations will be at an end, and you will bring in a verdict for the defendants. Before you can consider the question of negligence, plaintiff must prove by a preponderance of satisfactory evidence that defendants' truck was the one involved in this accident.

The burden of proving an allegation is laid upon the party making any claim. That claim must be proved by a preponderance of satisfactory evidence. In determining whether plaintiff has sustained this burden, evidence is deemed satisfactory only if it produces moral certainty or conviction in an unprejudiced mind. Only evidence which produces such moral certainty or conviction is sufficient to justify a verdict. Any evidence less than this is insufficient. If the evidence on any issue is evenly balanced, you may not find in favor of the person who has the burden. A preponderance of satisfactory evidence does not mean the greater number of witnesses, but it means the greater weight and the convincing character of the evidence that is introduced.

If you find by a preponderance of satisfactory evidence that Mr. Burr was driving a West Coast Fast Freight truck at the time and place of the accident, you will consider whether the defendants were guilty of one or more acts of negligence charged against them by plaintiff. [246] However, before I take up the specific acts of negligence I will lay down some general rules which will govern you in your deliberations.

The mere fact that an accident occurred is no evidence of negligence, and you may not find that defendants were guilty of negligence solely by reason of the fact that an accident occurred. The law does not impose liability upon any person in the absence of fault, nor does the law presume that any person is at fault in the absence of proof of such fault. On the contrary, the law presumes that each party involved in this case exercised all the care which an ordinarily prudent person would have exercised under all of the circumstances.

The defendant West Coast Fast Freight is a corporation, and corporations must necessarily act through individual persons. Mr. Burr, the driver of the truck, was an employee of West Coast, and during this trip to California on Highway 99E he was acting in the course of his duties of employment. Therefore, if you find that this truck was involved in the accident with Mrs. Walker and if you find that such driver did or failed to do something which under the circumstances amounted to negligence, then such negligence, if any is deemed to be the negligence of his employer, West Coast Fast Freight.

Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the [247] same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. This is the common law definition. In addition, there are certain statutory rules for the operation of motor vehicles on the highway, and these statutory rules make it incumbent upon a per-

son of ordinary prudence to act in accordance with their directions, and the failure to so act constitutes negligence in and of itself.

Here are the specifications of negligence upon which plaintiff must recover, if at all.

First, plaintiff claims that the defendants were negligent in driving and operating the motor truck when the same was not equipped with clearance lamps and reflectors as required by law for not having the clearance lamps lighted. Under the law, after sunset a truck and trailer such as the one owned by defendant West Coast Fast Freight, which is more than 30 feet in length is required to have two clearance lamps, one on each side of the front and rear, and two side marker lamps on each side, one near the front and one near the rear, and a reflector on each side near the front. The front clearance lamps and marker lamps and reflectors shall reflect an amber color and shall be between 2 feet and 5 feet from the ground. These reflector and clearance lamps and side marker lamps shall be visible under normal atmospheric conditions for a distance of 500 feet.

You have heard the testimony, and it will be [248] for you to determine whether the defendant had lights on the truck in accordance with the requirements of this statute and whether they were all burning at the time of the alleged accident. If you find that they were not maintained or not burning, then such condition would violate the statute and would constitute negligence in and of itself.

Plaintiff next contends that the defendant was

negligent in passing another vehicle proceeding in the same direction as the motor truck when the left side of the highway was not clearly visible and free of oncoming traffic for a sufficient distance ahead to permit the truck to overtake and pass the other vehicle in safety.

The state law provides that: The driver of a vehicle shall not drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without impeding the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken.

You have heard the evidence on this point, and it will be for you to determine from all of the evidence whether the plaintiff has proved by a preponderance of satisfactory evidence that the defendants were guilty of negligence in such respect. [249]

Lastly, plaintiff contends that the defendants failed to maintain a proper or any lookout for other vehicles and particularly for the vehicle which was operated by plaintiff. In this connection I instruct you that every operator of a vehicle on a highway is required to keep a proper lookout for other vehicles using such highway, and a proper lookout means that kind of a lookout that a person of ordinary prudence would have maintained and exercised under the same or similar circumstances.

If plaintiff fails to prove by a preponderance

of satisfactory evidence that the defendants were guilty of negligence in one or more of the four specifications to which I have referred, then your deliberations will be at an end, but if you find by a preponderance of satisfactory evidence that the defendants were guilty of at least one of such acts of negligence, then you will consider the question of proximate cause.

Proximate cause is probable cause. It is that cause which in direct sequence, without any efficient intervening cause produced the accident and injury. Therefore, if you find that the defendants were guilty of negligence in one or more particulars charged against them by the plaintiff, that does not settle your problem unless you go further and find by a preponderance of satisfactory evidence that the particular negligence was the proximate cause of the injury. [250]

If you find in favor of the defendants, of course, your deliberations will be at an end, and you will return a verdict in favor of the defendants. However, if you find from a preponderance of satisfactory evidence that the defendants were guilty of one or more acts of negligence which proximately caused the accident, then you will consider the question of damages which plaintiff alleges she sustained. The fact that I instruct you on damages does not mean I am of the opinion that plaintiff is or is not entitled to recover against the defendants. I am expressing no opinion on that subject one way or the other. Damages, like any other proposition, must be proved by a prepon-

derance of the evidence on the part of the person making the claim, and plaintiff being a claimant must sustain that burden. In other words she must prove her claim of damages by a preponderance of satisfactory evidence. If you find that plaintiff is entitled to recover damages, you will then award her such sum of money as damages as will fully, justly and completely compensate her for the injuries which you find she has suffered by reason of the negligence of the defendants in the accident. In so doing, you should take into consideration the injuries which she has sustained, the disability, pain and suffering which she has endured, and the disability, pain and suffering which she will endure in the future, if you find that plaintiff will endure such disability, pain and suffering as a result of that accident. [251]

I had not intended to discuss the particular types of injuries which Mrs. Walker contends she suffered, but in view of the fact that the arguments of counsel are in such disagreement I think I shall. She claims on February 10, 1955, which is ten days ago, that she was suffering from numerous bruises and contusions to the plaintiff's body, severe brain concussion and brain damage, severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her neck back, pelvic area, right hip and leg, injuries to her upper chest, and aggravation of pre-existing arrested tuberculosis,

from all of which plaintiff was rendered sick, sore, nervous and distressed, and that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest, and will be permanently afflicted with the results of aggravation and dissemination of said tuberculosis.

As you heard from decisions from counsel, some of these claims have now been withdrawn, and as to permanent injury—as to the tuberculosis, of course, you cannot award her anything for that because she had tuberculosis prior to the time of the accident. Even if you award her on the accident, you cannot allow her a sum by way of compensation by reason of the tuberculosis by way of permanent damage, and the same is true of any claim for brain damage. No amount may be allowed for permanent [252] injury to the brain or permanent injury to the hip.

Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx.

In connection with those claims for permanent injury, I instruct you that before you are warranted in allowing any sum by way of compensation for any alleged permanent injury, you must be reasonably certain, from a preponderance of satisfactory evidence, that the plaintiff has sustained permanent injury and disability.

You have heard the evidence with reference to the other injuries which plaintiff says she sustained, and you have heard the medical testimony, and you are to allow her such sum as you regard as reasonable for those other injuries, whatever you find them to be, but you may not allow any sum by way of permanent injury except if you find that she has permanent injury to her coccyx and low back.

In addition to plaintiff's claim for pain and suffering and the injuries which she has sustained, plaintiff has asked for an allowance of \$956.13 for medical and hospital expenses which she has incurred. If you find in favor of the plaintiff, she would be entitled to a reasonable amount [253] incurred by her for the reasonable value of the medical and hospital services which she received and for which she is liable. Therefore, if you find for the plaintiff, you may allow her the sum of \$956.13 for medical and hospital expenses, and that is in addition to the amount you allow her for general damages.

The amount you will award plaintiff must be reached and founded upon an unprejudiced consideration of all the facts of the case and without sympathy, prejudice or a desire to punish anyone and without any thought of plaintiff's financial condition or the defendant's ability to pay.

I want to make one comment. The principle question involved in this lawsuit is whether plaintiff has proved by a preponderance of the evidence that defendant's truck was the one involved in this

accident. In my opinion, it does not make any difference whether the lights were burning or not burning. If a truck came over on the wrong side of the road and drove this lady off the highway, she is entitled to recover. If it was a West Coast Fast Freight truck—it does not matter whether the lights were burning or whether the crest of the highway was 500 or 600 feet away—if that was the truck that did it and it was on the wrong side of the road, in my view, she is entitled to recover, but you must find that it was a West Coast Fast Freight truck that drove her off the highway. [254]

You are the sole and and exclusive judges of the facts in the case and of the credibility of all witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence.

Even though it is your function and yours alone to decide where the truth lies, by what yardstick and in accordance with what rules of law are you to judge the credibility of witnesses? Every witness is presumed to speak the truth, but this presumption may be out-weighted by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence.

You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Of course, when I speak of witnesses I speak of

the plaintiff and the defendants who, whether they testified in person or in deposition, are witnesses in the case. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. [255] Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection, like the failure of recollection, particularly as to times, dates, and places, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or wilfull falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you think it deserves.

In other words, there is nothing peculiarly different in the way a jury is to determine the credibility of a witness from that in which all reasonable persons size up other people with whom they are dealing when making important decisions. You consider whether the person with whom you are dealing had the opportunity to observe and be familiar

with and remember the things he tells you about. You consider any possible interest he may have, and any bias or prejudice. You consider the person's demeanor. You decide whether he strikes you as fair and candid. In other words, you "size him up." Then you must consider the inherent believability of what he says and whether it accords with your own judgment or experience.

The same is true of witnesses. You ask yourself if they know what they are talking about. You watch them [256] on the stand as they testify and note their demeanor. You decide how their testimony strikes you.

Take a matter of interest, for example. You may consider that some witnesses, whether for the plaintiff or the defendants, have an interest in the outcome of the case. Where a witness has a personal interest in the result of the trial, the temptation may be strong to color, pervert, or withhold the facts, or even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony. On the other hand, such a witness may be telling the exact truth despite his interest in the outcome. You must consider all the attendant circumstances in deciding whether and to what extent interest may affect the witness.

The greater a person's interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

Manifestly, she has a vital interest in the outcome

of the case. This interest is one of the matters you may consider along with other attendant circumstances in determining the credence you will give to her testimony.

Before reaching any conclusion as to whether you believe the testimony of any particular witness or of the plaintiff herself or the defendants or as to whether you will believe part of the testimony of such witness or party [257] and reject the rest, it is essential that you give consideration to all the circumstances bearing upon the question of credibility as I have outlined it for you.

While you are not at liberty to reject the testimony of a witness arbitrarily, there are occasions when you are justified in so doing. Under the law, if you find that a witness has testified falsely in any one material part of his testimony, you may look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false, you will be at liberty to disregard all the evidence given you by such witness unless corroborated by other evidence which you do believe.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in this case. Therefore, you are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number, or a presumption, or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at

liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice. It does mean that you are not to decide any issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not in the relative number of witnesses, but in the relative [258] convincing force of the evidence.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eye-witness, that is direct evidence. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself conclusively establish the fact, but affords an inference or presumption of its existence. Indirect evidence sometimes may be stronger on account of the inferences which may be drawn from it than the testimony by witnesses.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule is the case of an expert witness. A witness who by education and experience has become an expert in any art, science, or profession may state his opinion as to a matter in which he is versed and which is material to the case, and he may also state his reasons for such opinion. In this case you have heard the testimony of the

physicians who qualified as experts. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. Such opinion will be judged upon the same basis as you would [259] judge the opinions of lay persons who have testified except that you are entitled to give it more weight if you decide that, because of the experience and training of the expert, his opinion is more likely to be accurate than that of an untrained person. You may reject it entirely if you think that the reasons given in support of the opinion are unsound.

You should look with caution upon the oral admissions of a party, as that kind of evidence is subject to mistake. The party may have been misinformed or may not have clearly expressed his or her meaning or the witness may have misunderstood him. However, if you find that the admission was knowingly made, then, of course, it may be used for all purposes.

You will have with you in the jury room all of the exhibits that have been admitted in evidence, and you will have with you two forms of verdict. The verdict for plaintiff reads as follows: "We, the Jury, duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff Dorothy S. Walker, and against the defendants West Coast Fast Freight, Inc., a corporation, and M. L. Burr, and each of them, and assess plaintiff's damages in the sum of \$." If you find for plaintiff, you are to use this form of verdict, and you are to include in that one blank space all the

amounts to which you find plaintiff is entitled, that is, the \$956.13 for hospital and medical care, and the amount you [260] find for the permanent damage and the other injuries which she sustained, and you are to include in this one blank space allowance for pain and suffering and all the other items to which I referred in my instructions on damages.

The verdict is to be signed by the foreman alone. I call your attention to the fact that in the Federal Court the verdict must be unanimous; therefore, before the foreman signs this verdict, he or she, whoever it may be, must make sure that it represents the unanimous opinion of each juror on each issue. In other words, it must not only be on the question of liability but also on the question of damages.

I think in the past I have told you about quotient verdicts. If you come to the question of damages you cannot agree in advance that each person will set down the amount to which he or she believes plaintiff is entitled, add it up, and then divide it by twelve and say in advance that that is the amount which you are going to give to the plaintiff. Under the law, that type of verdict, which is called a quotient verdict, or any other verdict obtained in any mechanical way is unlawful. Each person must agree to the amount of the verdict. The jurors cannot agree in advance as to the technique of doing it.

If you decide in favor of defendants, you will use the other form of verdict which says: "We, the jury, empaneled and sworn to try the above-entitled cause, do [261] find our verdict against the plain-

tiff and in favor of the defendants.” Before you can use that verdict, which is to be signed by the foreman alone, it likewise must represent the unanimous opinion of each of the jurors. That means each juror has to agree.

Before the bailiff is sworn there is a legal matter that I would like to take up with Counsel in Chambers.

(Thereupon the following proceedings were had in the Court’s chambers:)

Mr. Peterson: I do not know what the Court’s practice is in respect to giving what is defined under the Oregon statutes as being statutory instructions, the one in relation to evidence to be judged not alone by its intrinsic weight but the evidence that is within the power of a party to produce. Therefore, if the weaker or less satisfactory evidence is produced when it appears that a stronger and more satisfactory can be produced, such evidence is to be viewed with distrust. I do not know what the practice of the Court is.

The Court: We do not give that. Unless it is requested we would not give it, and in this particular case I do not think I would give it because each party under our practice had the opportunity of getting the same evidence. You may have an exception.

Mr. Peterson: With that, the plaintiff has no other exceptions. [262]

Mr. Gearin: The defendants and each of them, your Honor respectfully objects to the Court’s sub-

mission to the jury—although there was later comment with regard to the lack of clearance lights and reflectors—in giving the statute on lamps and reflectors to the jury, on the ground and for the reason that there is no evidence whatsoever that we did not have reflectors, and, secondly, that as a matter of law the matter of clearance lights and reflectors could not have any casual relation with the accident.

We object to the failure of the Court to withdraw the charge of lookout and submitting the same, that being our requested instruction No. 8, on the ground and for the reason that there is no evidence in this case that the defendants or either of them were guilty of negligence in that particular.

In Open Court

The Court: You are now excused to go and deliberate.

(Jury retires for deliberations at 3:50 p.m.
After deliberating the jury returned to open court and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, Mr. Price, the bailiff, informs me that you have a question.

Foreman Marian I. Green: I have, your Honor. In fact, the jury has two questions they are not clear about [263] and would like an answer for it.

The Court: Does it involve matters about which I have already instructed you?

Foreman Green: Well, they are concerning matters of evidence.

The Court: You mean they are evidence that you do not recall?

Foreman Green: We do, but they want to know why the evidence was not produced.

The Court: In this court you cannot speculate about evidence not being produced. You have to take the evidence as it is introduced here. The attorneys are the ones that determine what evidence shall be submitted in court.

Foreman Green: We understand that, but they are still rather adamant about one particular point that I am not able to convince them on, and they want to know why, I have given my opinion of what I think that there is in evidence. Could I approach your desk and ask? Or is that not allowed?

The Court: I thought that I had given you all the instructions that are necessary. We do not like to give any new instructions.

Foreman Green: I really do not know what to do about it. I have done what I thought was right, but they seem to think that it should be cleared up before they can [264] reach a decision.

The Court: I am going to let you state the question. According to the understanding that counsel and I reached before, no question will be answered at the time you asked it unless everybody consents to it, and even if you ask the question I might not consent to it.

Foreman Green: Well, that is agreed upon, and the question was why the driver's log was not produced.

The Court: Do you mean the tachograph?

Foreman Green: The log. If I understood right, the tachograph was destroyed, to my knowledge, but the question was about the driver's log.

The Court: I would like to see counsel in chambers.

(Thereupon, the following proceedings were had in the Court's chambers:)

The Court: I will tell the jury that under the rules of law either party can get any information that is in existence through the deposition procedure and through notice; that it was not produced by either party, and from that they may draw an inference that it would not show anything or that it was not available.

Mr. Gearin: That would be very fair, your Honor.

The Court: Or I could just say that it was not available.

Mr. Gearin: I think your initial statement would be very fair to everybody concerned because they only took the [265] deposition of our driver and no one else, your Honor.

Mr. Peterson: I would feel in view of the evidence in the case that probably the question should be unanswered. I recognize it is a very difficult question.

The Court: Do you want the question not to be answered?

Mr. Peterson: I would think that that would be correct in view of the case.

Mr. Gearin: It is up to them to prove what was

in the log, and they cannot make us produce records all over the map when they had it within their power to produce it. We do not have to prove anything. I think what your Honor said just a minute ago as to the explanation under the rules of law that we have, I think that was fair to everybody, and to leave it unanswered now certainly would be more than prejudicial to the defendants.

The Court: It may be, but you are the one who asked for it. I gave you that opportunity.

Mr. Peterson: That was a pure oversight of counsel, your Honor. I attempted to answer it and argue it. It came out in argument, your Honor. Your Honor was perfectly right in ruling as you did. I would have no complaint about your Honor's ruling. I believe, however, to be fair with us, that what your Honor indicated you would have to say, that they could have produced it or explained its absence, but there is nothing to be drawn by its failure to be here. Nobody has produced it, especially since we have [266] no burden of proof.

The Court: I will say that no inference is to be drawn one way or the other by its absence.

Mr. Gearin: That is all right with me.

The Court: Is that all right?

Mr. Peterson: I think that that would be outside the evidence, your Honor. I sincerely feel that that would be outside of the evidence that the jury is bound to consider.

(Thereupon in open Court the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I

have taken the matter up with both of the attorneys, and I have considered some law, and I have come to the conclusion, and both counsel agree with me, that this question cannot be answered now. We are all of the opinion that no inference either for or against the plaintiff or the defendant can be drawn by the jury from the failure to produce that document, nothing bad, nothing good against either the plaintiff or the defendants by that failure, and you must decide the case on the evidence that has been introduced.

Foreman Green: Thank you, your Honor.

(Thereupon, the jury retired for further deliberations.)

Mr. Gearin: I have no exception to the Court's remarks.

Mr. Peterson: Your Honor, I agree with the first, no exception to the Court instruction the jury that the [267] question could not be answered, but I would save an exception to the Court directing the jury that they could draw no inference under the evidence in this case.

The Court: I thought that is what we agreed to in chambers before we came into open court, and you had specifically told me that this was outside the evidence; they could not consider it, and I told you before that I would instruct them that no inference for or against either party can be drawn by the failure to produce that evidence. I was under the impression that you agreed to it.

Mr. Peterson: Your Honor, perhaps I did not

make myself clear. I thought I advised the Court that it was my view, under the evidence, that the Court should not direct any inference or lack of inference to be drawn but simply the question could not be answered. Perhaps I did not make my point clear in chambers. That is what I attempted to do.

The Court: Do you not recall telling me just as we were leaving the Chambers that it was outside the evidence and could not be considered?

Mr. Peterson: I did, your Honor.

The Court: I will let the record speak for itself.

(Trial concluded.) [268]

Certificate

State of Oregon,
County of Multnomah—ss.

I, Gordon R. Griffiths, an official court reporter to the United States District Courts for the District of Oregon, hereby certify, that at the time and place mentioned in the caption I reported in shorthand all proceedings had and testimony adduced in the above entitled cause; that my shorthand notes were thereafter reduced to typewriting under my direction, and that the foregoing transcript consisting of 268 typewritten pages is a true and correct transcript of all said proceedings had and testimony adduced, and of the whole thereof.

Witness my hand at Portland, Oregon, this 10th day of May, 1955.

/s/ GORDON R. GRIFFITHS.

[Endorsed]: Filed June 10, 1955.

United States District Court,
District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

Monday, March 21, 1955, 11:00 A.M.

TRANSCRIPT OF PROCEEDINGS IN RE:
MOTION OF PLAINTIFF FOR NEW
TRIAL

Mr. Peterson: May it please the Court: In this matter counsel for defendants has fifteen minutes ago served me with an affidavit in respect to this motion for a new trial. The essence of the affidavit is that Mr. Gearin was one of the attorneys for defendants; that he has been in charge of the case as far as defendants are concerned since its inception, and at no time did he have any knowledge that plaintiff sustained or was going to claim any of these child-bearing inconveniences or difficulties in child-bearing.

The Court: I have read the affidavit.

Mr. Peterson: I want to advise the Court that long prior to July 9, 1954, eight months prior to the time of this trial, that Mr. Gearin made an appoint-

ment with Dr. John L. Marxer to have Mrs. Walker given a physical examination. An appointment was arranged for July 19, 1954, at 2:30 o'clock. I notified Dorothy Walker upon receipt of this notice, and she advised me that she could not have any physical examination because of pregnancy. When she saw her doctor he advised her that she should not have any pelvic examination because she was five months pregnant and that she should have no X-rays for two or three months after the child was born, and that I immediately communicated——

The Court: What difference would that make?

Mr. Peterson: I want to advise the Court.

Mr. Gearin: I knew she was pregnant, your Honor. [2*]

The Court: He says she was pregnant.

Mr. Peterson: There is no surprise as far as the defendant is concerned.

The Court: There is no surprise about the pregnancy, but you have not set it out in your pre-trial order.

Mr. Peterson: That is true, your Honor, I have not set it out, but this is the language that I have used, and I respectfully say to the Court that what we sought to prove was admissible under those pleadings.

The Court: Mr. Peterson, I gave you an opportunity to call your doctor, and you did not do it.

Mr. Peterson: You advised me that the Court would not receive it. As a matter of fact, when I

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

made my opening statement to the jury you said that that was not proper and we could not prove it.

The Court: Then you tried to get it in on the testimony, and I said you could not do it in that way, in any event, and you said that you wanted to make an offer of proof. In the first place, I told you to call the doctor back, but then you told me that for the first time you learned that he was not the doctor who could testify to that.

Mr. Peterson: That is right.

The Court: Then you said that the only doctor that could testify would be the obstetrician and you would try to get hold of him.

Mr. Peterson: Correct.

The Court: Mr. Peterson, you came here trying to make an opening statement on a subject matter about which you had never talked to a physician, did you not?

Mr. Peterson: No, your Honor.

The Court: When had you talked to the obstetrician?

Mr. Peterson: I received a letter from the obstetrician dated August 9, 1954, and I will read that letter to the Court.

The Court: Had you made arrangements for the obstetrician to come into court?

Mr. Peterson: No, I had not, your Honor.

The Court: I do not think very much of that contention, and the contention is denied. You may have an exception.

Mr. Peterson: Your Honor, the Court instructed the jury that they could not consider her life ex-

pectancy, and the Court would give no instruction as to her life expectancy or any matter relating to her life expectancy. I believe the Court stated to me and to Counsel that because she had had tuberculosis her life expectancy could not be considered by the jury.

The Court: Mr. Peterson, she not only had tuberculosis but she was taking treatment at the time of the accident, and I think she was taking treatment at the time of the trial. Here is a woman who is suffering from tuberculosis, and I do not think that under those circumstances the mortality tables are admissible.

Mr. Peterson: The case of *Frangos vs. Edmunds* held that they are; 179 Oregon.

The Court: For a person suffering from tuberculosis?

Mr. Peterson: No, but the rule was that the Court takes judicial notice of that and that when a person has permanent injuries the Court may instruct the jury as to what the mortality tables are, but the determination of life expectancy of the plaintiff when he or she has permanent injuries is a question of fact for the jury to take into consideration; the age, sex, health, the nature of the plaintiff's occupation, whether hazardous or not.

The Court: Suppose that she had had instead of tuberculosis cancer of the stomach. Would you say that I should instruct the jury on the question of the mortality tables?

Mr. Peterson: Yes, because that is a question of fact for the jury's determination.

The Court: I am going to deny your motion for a new trial on that ground also.

Mr. Peterson: My third main point, your Honor, is inadequacy of the verdict. The testimony was that she had occurred 956 dollars, some-odd, special damages, but the jury gave her \$1,500. I submit that under the decided cases such a verdict is inadequate, and in the Federal Court, as I understand it, grounds for granting a new trial are—— [5]

The Court: Mr. Peterson, this is a consistent verdict if the jurors did not believe some of your own physicians because I believe it was perfectly proper for the jury to come to the conclusion that this woman was suffering from tuberculosis but that her condition had not been aggravated a great deal or at all by the accident. The testimony was that she coughed up a little blood within a very short time, and there was quite a disagreement at that time between her testimony and the medical and the hospital reports as to the quantity of blood. Likewise, I thought your medical testimony was very weak, particularly testimony of Dr. Selling. That was better testimony for the defendant. I do not see how on the basis of the testimony of your physicians the jury could have allowed her a great deal. Her testimony was much better as to the amount of disability. I did not think that it was supported by the medical testimony.

Mr. Peterson: Your Honor, if I may, here is what the doctors testified, as I recall it. Dr. Tuhý testified that she had scar tissue on her lungs; that she had a bruised lung as a consequence of this ac-

cident, and because of the scar tissue she had bled into the lung, bled into the lung, and that was one of the primary reasons that he hospitalized her for seven weeks at the University Hospital to check to see if there had been exacerbation or aggravation of the tuberculosis, [6] but he thought there was no dissemination of tuberculosis and that she had no permanent injury of the lung.

Dr. Selling, a neurosurgeon, testified she had a brain injury.

The Court: Mr. Peterson, you did not listen to his testimony. He did not say that she had a brain injury.

Mr. Peterson: I should submit, your Honor, he said as evidence by the tests which he did, neurological tests, which had disappeared at the time of the trial, which were residual, the headaches which he thought would disappear within two or three years. That was the essence of Dr. Selling's testimony.

Dr. Abele testified she had a lumbosacral sprain. It was permanent. It would require reasonably, probably, that she would have to have a spinal fusion; that she had a coccyx injury which would require surgical removal.

The only adverse testimony medically was that of Dr. Jones, and Dr. Jones said that upon the business occupation from the plaintiff's standpoint, his testimony is that she had a painful coccyx and a painful hip upon his examination. Otherwise, he said he found no objective symptoms of injury.

Now, that is from the worst and the best stand-

point of the medical testimony. I submit that it is inadequate.

The Court: I realize that the plaintiff did not get the verdict that she anticipated getting, and it may very well be that some of the liability elements played a part, but under [7] the decisions I do not believe that the plaintiff is entitled to have a judicial declaration that there is inadequacy in damages because, had the jury believed the testimony of Dr. Jones, they could have found that the plaintiff suffered damage to \$1,500 or perhaps even less. I do not think that this is a case in which I should disturb the verdict of the jury, and the motion is denied.

(Hearing concluded.)

Reporter's Certificate

I, Gordon R. Griffiths, an Official Reporter for the United States District Court for the District of Oregon, hereby certify that I reported in shorthand at the time and place mentioned in the caption sheet, all proceedings had in the above-entitled matter; that I thereafter caused my shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of 8 pages, is a true and correct transcript of said proceedings, and of the whole thereof.

/s/ GORDON R. GRIFFITH,
Reporter.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pre-trial order; Verdict; Judgment order; Motion for a new trial; Judgment and order denying motion for new trial; Notice of appeal; Bond for costs on appeal; Designation of record; Order to forward exhibits to Court of Appeals; Appellees' designation of record; Affidavit of John Gordon Gearin; Consent to addition of attorney; Order declaring Burton J. Fallgren as attorney of record; Transcript of docket entries; Motion to extend time to docket appeal; Affidavit of Burton J. Fallgren; Order extending time to June 16, 1955, to docket appeal; and Statement of points upon which plaintiff intends to rely, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7092, in which Dorothy S. Walker is the plaintiff and appellant and West Coast Fast Freight., Inc, a corporation, et al. are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and appellees, and in accordance with the rules of this court.

I further certify that the cost of filing the notice

of appeal is \$5.00, and that the same has been paid by the appellant.

I further certify that there is also enclosed the reporter's transcript of proceedings of February 23, 1955. Under separate cover we are forwarding Exhibits 1-A to J; 4; 6; 8; 10; 11; 12; 14-A to E; 26-A to E; 27; 30-A to D; and 31-A and B. Also reporter's transcript of proceedings during hearing of appellant's motion for new trial, (No. 2 of Appellees' designation of record).

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of June, 1955.

[Seal] F. L. BUCK,
 Acting Clerk,

By /s/ THORA LUND,
 Deputy.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing document consisting of transcript of testimony of proceedings had on March 21, 1955, constitutes the supplemental record in cause numbered Civil 7092, Dorothy S. Walker, Plaintiff and

Appellant, and West Coast Fast Freight, Inc., a corporation, et al. are the defendants and appellees.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court on Portland, in said District, this 9th day of August, 1955.

[Seal] R. DEMOTT,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 14788. United States Court of Appeals for the Ninth Circuit. Dorothy S. Walker, Appellant, vs. West Coast Fast Freight, Inc., a Corporation, and M. L. Burr, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 11, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14788

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation,
and M. L. BURR,

Appellees.

STATEMENT OF POINTS UPON WHICH
PLAINTIFF INTENDS TO RELY

Pursuant to Rule 19(6) of the rules of the above-entitled Court, appellant presents the following statement of points upon which she intends to rely on appeal of the above-entitled cause.

1. The trial Court erred in advising counsel for the plaintiff during opening statement that said counsel's reference to pain and difficulties from pregnancy and childbirth of the plaintiff subsequent to the injuries complained of should not have been referred to and were not admissible upon trial, without objection made by counsel for defendants. (Tr. P. 1-O) (Designation No. 1 Pre-Trial Order).

2. The trial Court erred in refusing to permit plaintiff to prove by expert medical testimony the effects of the injuries to her lower back, known to medical science as lumbo-sacral sprain, and displace-

ment of her coccyx. (Tr. P. 1-O et seq and PP. 239 et seq. Designation No. 1 Pre-Trial Order).

3. The trial Court erred in refusing to permit plaintiff to testify as to the effects in the nature of pain and suffering and the difficulties of pregnancy and childbirth, arising from the injuries complained of. (Tr. P. 32) (Designation No. 1 Pre-Trial Order).

4. The trial Court erred in failing to sustain plaintiff's objection to the question asked on direct examination of defendant's expert medical witness, Dr. Orville Noble Jones, as follows: (Tr. P. 114)

“Question: Will you relate to the jury what this lady told you with reference to how she got hurt.” and in permitting said medical expert witness to relate in answer to said question a purported history of injury.

5. The trial Court erred in failing and refusing to give plaintiff's requested instruction No. 8, which written instruction is as follows:

“In this case, if you find that the plaintiff Dorothy S. Walker is entitled to a verdict at your hands, then it will be your duty to assess plaintiff's damages. You are instructed that the law aims at just, fair and reasonable compensation. In assessing damages for the plaintiff, you will take into consideration the nature and extent of plaintiff's injuries. You will also take into consideration all of the pain and suffering which plaintiff has endured, if any, as a result of injuries sustained by her. Such pain and suffering includes both

physical and mental suffering. You will also take into consideration whether plaintiff will be caused to endure pain and suffering in the future. You will also take into consideration whether plaintiff's injuries, if any, are permanent. If you find that plaintiff's injuries are permanent, then you will take into consideration plaintiff's life expectancy.

"You are instructed that under the Standard American Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not.

"You will also take into consideration whether plaintiff's injuries, if any, permanently impaired her ability to work and perform physical activities.

"You will also take into consideration the amount of the reasonable value, as shown by the evidence in this case, of all doctor, hospital, ambulance and medical expenses incurred by the plaintiff in the treatment of injuries sustained by her, if any.

"After considering all of the foregoing matters, you will assess such sum of money to the plaintiff as will fairly and reasonably compensate her for her injuries, if any, her pain and suffering, both physical and mental, past and future, if any, and the permanent effect of her injuries upon the plaintiff, if you find that plaintiff has permanent injuries."

6. The trial Court erred in its instructions to the jury in making the following statement: (Tr. P. 253).

“Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx.”

7. The trial Court erred in its instructions to the jury in making the following statement: (Tr. P. 253.)

“In connection with those claims for permanent injury, I instruct you that before you are warranted in allowing any sum by way of compensation for any alleged permanent injury, you must be reasonably certain, from a preponderance of satisfactory evidence, that the plaintiff has sustained permanent injury and disability.”

8. The trial Court erred in its instructions to the jury in making the following statement: (Tr. P. 257.)

“The greater a person’s interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

“Manifestly, she has a vital interest in the outcome of the case. This interest is one of the matters

you may consider along with other attendant circumstances in determining the credence you will give to her testimony.”

9. Error prejudicial to plaintiff appellant occurred by misconduct of the jury in failing and neglecting to award plaintiff an adequate sum for plaintiff's injuries and damages as shown by the evidence in the case. (Designation No. 2, Verdict.)

10. The trial Court erred in failing and refusing to grant plaintiff's motion for a new trial. (Designation No. 4, Order Denying Motion for New Trial.)

Appellant adopts the designation of record as filed in the United States District Court for the District of Oregon, in the above-entitled cause.

PETERSON & POZZI,

BERKELEY LENT,

BURTON J. FALLGREN,

By /s/ NELS PETERSON,

Attorneys for Appellant.

Duly verified.

[Endorsed]: Filed June 16, 1955.

United States
COURT OF APPEALS
for the Ninth Circuit

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC.,
a corporation, and M. L. BURR,

Appellees.

BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

FILED

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NOV 25 1955

PAUL P. O'BRIEN, CLERK



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United States
COURT OF APPEALS
for the Ninth Circuit

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC.,
a corporation, and M. L. BURR,

Appellees.

BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

**STATEMENT OF PLEADINGS AND
FACTS OF JURISDICTION**

This is a cause on appeal from the United States District Court for the District of Oregon. It is an action in which plaintiff seeks to recover the sum of \$75,000.00 (Tr. 6), general damages, and \$936.13, special damages (Tr. 6), from defendants. Appellant recovered judgment

in the United States District Court for the District of Oregon against appellees for the sum of \$1,500.00, together with costs and disbursements (Tr. 9), and appellant appeals from that judgment.

The appellant was a citizen of the State of Oregon (Tr. 3), and appellee, West Coast Fast Freight, Inc., was a citizen of the State of California, with office and principal place of business in Portland, Multnomah County, Oregon (Tr. 3), and appellee, M. L. Burr, was a citizen of the State of Washington (Tr. 4); the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00 (Tr. 4).

This action was removed to the United States District Court for the District of Oregon, pursuant to 28 U.S.C.A. Secs. 1332 and 1441 (Tr. 4).

This Court has appellate jurisdiction to review this case by virtue of 28 U.S.C.A. 1291.

The documents showing the existence of jurisdiction are the Pre-trial Order (Tr. 3), Judgment Order (Tr. 9), Notice of Appeal (Tr. 15), and Bond for Costs of Appeal (Tr. 16).

STATEMENT OF THE CASE

This cause arises out of an automobile accident in which appellant was injured on May 3, 1953, on Highway 99E, near Albany, Oregon (Tr. 4). Appellee, M. L. Burr, was employed by appellee, West Coast Fast Freight, Inc., at the time of the occurrence, as a truck-driver (Tr. 4).

Plaintiff contended that at said time and place, appellee, M. L. Burr, so negligently drove a motor truck owned by defendant corporation as to force appellant to drive her automobile off of said highway in order to avoid a head-on collision with the vehicle being driven by appellee, M. L. Burr, on the wrong (left) half of said highway (Tr. 5); that in driving her automobile off of said highway, appellant was seriously injured (Tr. 5), and brought action to recover \$75,000.00, general damages, and \$936.13, special damages (Tr. 6).

That prior to the trial of said case, appellant was examined by a doctor selected by appellee and X-rays were taken of appellant by said doctor (Tr. 141).

That subsequent to said injury appellant became pregnant with child (Tr. 68), the birth of which was untimely produced by stimulation necessitated by reason of the injuries received in said accident (Tr. 130).

That during plaintiff's opening statement the court, on its own volition, restricted plaintiff's description of her injuries, as well as the normal and natural effect thereof (Tr. 32), and during the course of said trial plaintiff was not permitted to testify to the natural effect of said injuries (Tr. 68), and was not permitted to prove, by expert medical testimony, the natural effect of said injuries (Tr. 130).

That the reason given for said restriction was that defendants had not been apprised of said claim and had no opportunity to anticipate it, and were therefore unable to properly defend said action (Tr. 130).

That during plaintiff's case in chief, defendants were permitted to call their own medical expert, who had examined plaintiff only for the purpose of qualifying himself (Tr. 141), and said expert was permitted, over the objection of plaintiff, to testify as to the medical history prepared by himself at the time of his examination of plaintiff (Tr. 142).

The court failed to include in its charge to the jury an instruction as to plaintiff's life expectancy under the Standard American Mortality Tables, though said instruction was requested in writing by plaintiff (Tr. 284).

The court, in its charge to the jury, unfavorably commented upon the evidence (Tr. 265, 269), without advising the jury that said instructions constituted comment, after first having advised the jury that it would tell the jury what portion of its instruction constituted comment (Tr. 257).

That the court commented upon the credibility of plaintiff's testimony, and by implication instructed the jury that her testimony was not worthy of belief, solely, on the basis that she had an interest possessed by no other witness (Tr. 269).

That plaintiff's special damages amounted to \$936.13 (Tr. 266), that the jury awarded judgment only in the sum of \$1500.00 (Tr. 9). That said sum was as a matter of law inadequate, considering the nature and extent of the injuries, the pain and suffering resulting therefrom, as well as the permanency of said injuries.

That after the entry of judgment in favor of plaintiff and against both defendants on February 28, 1955

(Tr. 9), plaintiff filed a motion for a new trial, based upon the above-mentioned facts, which motion was denied (Tr. 14).

Thereafter plaintiff brought this appeal from said judgment in her favor in the sum of \$1500.00, entered herein on February 28, 1955.

SPECIFICATIONS OF ERROR

I.

The trial Court erred in advising counsel for the plaintiff during opening statement that said counsel's reference to pain and difficulties from pregnancy and childbirth of the plaintiff subsequent to the injuries complained of should not have been referred to and were not admissible upon trial, without objection made by counsel for defendants (Tr. 32), for the reason that evidence of said pain and difficulties from pregnancy and childbirth was admissible under the pre-trial order (Tr. 5), and the comments of the Court were prejudicial in that they extended beyond the scope of the issue raised by the Court (Tr. 32); they were directed at Counsel personally, thereby inferring to the jury that counsel was acting improperly, and no objection was made on behalf of appellees, giving rise to an issue calling for the Court's ruling (Tr. 32), all of which was prejudicial in that it caused the jury to be biased unfavorably against appellant.

II.

The trial Court erred in refusing to permit plaintiff to prove by expert medical testimony the effects of the

injuries to her lower back, known to medical science as lumbo-sacral sprain, and displacement of her coccyx (Tr. 130), upon the ground and for the reason that appellant was entitled to prove the natural effect and result of the injuries alleged in the pre-trial order (Tr. 5).

III.

The trial Court erred in sustaining objection to the following question on direct examination of plaintiff:

"Q. Did you have any difficulty during the pregnancy . . . ?" "Objection." "Objection sustained." (Tr. 68.)

And in refusing to permit plaintiff to testify as to the effects in the nature of pain and suffering and difficulties of pregnancy and childbirth arising from the injuries complained of, as appears in the following offer of proof (Tr. 253):

"Q. Mrs. Walker, when did you give birth to the child, your last born child?

A. October 19, 1954.

Q. Was the child earlier than the nine-month period of gestation?

A. Yes.

Q. What period of gestation was there?

A. About seven and one-half months.

Q. Who was the doctor at that time?

A. Dr. George Lage.

Q. Is he an obstetrician?

A. Yes.

Q. Was there any inducement for earlier premature childbirth?

A. Yes.

Q. Did you have any difficulty with your back or right hip or coccyx during pregnancy?

A. Definitely, yes.

Q. Do you know the reason or relationship of

the pregnancy with your difficulty with your back and coccyx and right hip?

A. Yes.

Q. What is the relationship?

A. Well, as the baby got heavier and the pressure increased on the bone structure in that region, it became very painful or sore.

Q. Could you wear a back support for it?

A. I couldn't wear a back support because I could not have tightness over my tummy.

Q. Did any doctor prescribe a back support for you?

A. Dr. Abele told me to wear a tight girdle. That was before I was pregnant. I couldn't wear girdle because of the pregnancy." (Tr. 254.)

Upon the ground and for the reason the appellant was entitled to show the jury in what manner and to what extent the injuries described in the pre-trial order (Tr. 5), interfered with her normal physical functions and to show plaintiff's physical and mental pain and suffering.

IV.

The trial Court erred in failing to sustain plaintiff's objection to the question asked by defendants on direct examination of defendants' expert medical witness, Dr. Orville Noble Jones, as follows (Tr. 141):

"Q. Will you relate to the jury what this lady told with reference to how she got hurt?

A. Yes.

Mr. Peterson: I object to that, your Honor.

The Court: On what ground do you object?

Mr. Peterson: On the ground that it is not a history related to the witness as a treating doctor.

The Court: This is an adverse witness, Mr. Peterson. The objection is over-ruled." (Tr. 142.)

And in permitting said witness to relate in answer to said question a purported history of injury (Tr. 142),

upon the ground and for the reason that appellees' medical expert examined appellant only for the purpose of qualifying himself as a witness in this case and not for the purpose of treating appellant (Tr. 141), and that said purported history was adverse to plaintiff in that the witness testified that plaintiff had related that the car which she was driving "skidded and rolled down a sixty-foot embankment" (Tr. 142); that, "she carried out limited physical activity due to her tuberculosis" (Tr. 143); and, "that she admitted 'freely' a prior accident where she had a fractured rib, but no injuries to her pelvis, back and coccyx" (Tr. 144), said details being contrary to plaintiff's evidence.

V.

The trial Court erred in failing and refusing to give plaintiff's requested instruction No. 8, which written instruction is as follows (Tr. 284):

"In this case, if you find that the plaintiff Dorothy S. Walker is entitled to a verdict at your hands, then it will be your duty to assess plaintiff's damages. You are instructed that the law aims at just, fair and reasonable compensation. In assessing damages for the plaintiff, you will take into consideration the nature and extent of plaintiff's injuries. You will also take into consideration all of the pain and suffering which plaintiff has endured, if any, as a result of injuries sustained by her. Such pain and suffering includes both physical and mental suffering. You will also take into consideration whether plaintiff will be caused to endure pain and suffering in the future. You will also take into consideration whether plaintiff's injuries are permanent, then you will take into consideration plaintiff's life expectancy.

"You are instructed that under the Standard American Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not.

"You will take into consideration whether plaintiff's injuries, if any, permanently impaired her ability to work and perform physical activities.

"You will also take into consideration the amount of the reasonable value, as shown by the evidence in this case, of all doctor, hospital, ambulance and medical expenses incurred by the plaintiff in the treatment of injuries sustained by her, if any.

"After considering all of the foregoing matters, you will assess such sum of money to the plaintiff as will fairly and reasonably compensate her for her injuries, if any, her pain and suffering, both physical and mental, past and future, if any, and the permanent effect of her injuries upon the plaintiff, if you find that plaintiff has permanent injuries."

Upon the ground and for the reason that appellant was entitled to have the Court instruct the jury that under Standard Mortality Tables, appellant had a life expectancy of 33.44 years, her life expectancy, however, being a question of fact for the jury's determination, and to be considered in assessing plaintiff's damages (Tr. 6).

VI.

The trial Court erred in its instructions to the jury in making the following statement:

"Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least

one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx." (Tr. 265.)

Upon the ground and for the reason that said instruction is a comment upon the evidence without being so described, as the jury was advised would be done (Tr. 257). It is an abstract and misleading instruction in that it is improperly worded and tends to confuse the jury.

VII.

The trial Court erred in its instructions to the jury in making the following statement (Tr. 269):

"The greater a person's interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

"Manifestly, she has a vital interest in the outcome of the case. This interest is one of the matters you may consider along with other attendant circumstances in determining the credence you will give to her testimony."

Upon the ground and for the reason that said instruction is a comment upon the evidence without having been so described as the jury was advised could be done (Tr. 257); and upon the ground and for the reason that it is unfair comment without basis in law or fact in this case and indicates bias against the appellant, thereby tending to mislead and prejudice the jury against the appellant; and upon the ground and for the reason that said comment was an invasion of the province of the jury since the jury is the sole judge of the credibility of the witnesses (Tr. 258).

VIII.

Error prejudicial to plaintiff, appellant, occurred by misconduct of the jury in failing and neglecting to award plaintiff an adequate sum for plaintiff's injuries and damages as shown by the evidence in the case (Tr. 9B), upon the ground and for the reason that the sum awarded is unconscionably inadequate, considering the nature and extent of the injuries received by appellant, and the period of confinement caused by said injuries, and the permanency of said injuries.

IX.

The trial Court erred in failing and refusing to grant plaintiff's motion for a new trial (Tr. 14), upon the ground and for the reason that the trial Court committed prejudicial errors during the trial of this case, as set forth in the seven assignments of error above described, which deprived appellant of a fair trial, and misconduct of the jury deprived plaintiff of adequate compensation for her injuries.

SUMMARY OF ARGUMENT

Trial Court erred in restricting appellant's opening statement, without objection from opposing counsel; and in making undue comments, relative to appellant's opening statement, in the presence of the jury.

II.

Appellant contends that evidence of unusual physical and mental pain and suffering in giving birth to a child and the necessity of shortening the gestation period, as a

result of plaintiff's injuries, should have been admitted as being within the scope of the pre-trial order.

III.

Trial Court erred in permitting appellee's medical expert to relate a medical history to the jury, when said expert had not treated appellant, but had merely examined her for purpose of qualification.

IV.

Trial Court erred in failing to instruct the jury as to appellant's life expectancy, as found in the Standard American Mortality Tables.

V.

Trial Court erred in commenting upon the evidence and the credibility of the witnesses, without so advising the jury, after having promised the jury that the jury would be advised as to which statements constituted comment.

VI.

The jury was guilty of misconduct in assessing appellant's damages.

VII.

Trial Court erred in failing and refusing to grant plaintiff a new trial of the within cause.

VIII.

Appellant is entitled to have this cause again presented to the jury, and is entitled to have the jury fully advised as to the nature, extent and effect of her injuries and her physical and mental pain and suffering.

ARGUMENT

The pre-trial order (Tr. 3) provided:

“as a proximate result of the negligence of the defendants and each of them, plaintiff was forced off the road to avoid a head-on collision with the motor truck and caused this plaintiff severe personal injuries, among which were numerous bruises and contusions to the plaintiff's body, severe brain concussion and brain damage, severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her neck, back, pelvic area, right hip and leg, injuries to her upper chest, and aggravation of pre-existing arrested tuberculosis, from all of which plaintiff was rendered sick, sore, nervous and distressed, that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest, and will be permanently afflicted with the results of aggravation and dissemination of said tuberculosis, and has been damaged in the sum of \$75,000.00, general damages.” (Tr. 5.)

During the pendency of this case, defendants had available to them all of the discovery procedures available under the Federal Civil Rules of Procedure, and during that time, defendants did utilize discovery procedure in various ways, including: (1) Deposition taken of plaintiff by defendants (Tr. 61); (2) Physical examination of plaintiff by an orthopedic surgeon selected by defendants (Tr. 141).

In July 1954, more than six months prior to the trial of this cause, defendants were notified that plaintiff was pregnant (Tr. 282), and defendants were aware that the

injuries complained of were received on May 3, 1953 (Tr. 3).

During the course of plaintiff's opening statement, plaintiff sought to explain in what manner plaintiff's injuries affected her giving birth to the child with which she became pregnant after May 3, 1953 (Tr. 32). Without objection on the part of defendants, the court stated:

"Mr. Peterson, this is the second or third time that you have gone beyond the pre-trial order. There is nothing in the pre-trial order about spina bifida occulta aggravation, and now you are telling us about conditions with reference to the birth of a child. These are not in the pre-trial order. You have had plenty of opportunities to do it. You are not an inexperienced lawyer. I do not think that this should be done."

to which plaintiff answered,

"Your Honor, in respect to the spina bifida occulta, as I understand it, the testimony of the doctor will be there is no aggravation of it, and in respect to the childbirth, counsel is aware of that. He has had her examined recently, and I believe it proper under the charge of pain and suffering." Tr. 33.)

and the court replied:

"Do not do it any more." (Tr. 33.)

Upon the completion of the testimony of Dr. John F. Abele, plaintiff inquired whether he might make an offer of proof during the recess in the absence of the doctor, and the court granted this request (Tr. 113), whereupon the doctor was excused from further attendance of the trial (Tr. 112), and during the next recess plaintiff made the following offer of proof (Tr. 130):

"Mr. Peterson: If Dr. Abele had been asked the questions as to the low back injury including both the coccyx and the lumbosacral sprain in relation to pregnancy, he would have testified that Mrs. Walker spent the greater part of her pregnancy in bed because of the danger of miscarriage because of an induced birth, lumbosacral strain, and the coccyx injury displacement. The doctor would further have testified, if permitted, that because of the displacement of the coccyx delivery was prolonged and painful; that it might not otherwise have been true, and also that they stimulated Mrs. Walker in order to induce childbirth early, approximately at six months, in order to avoid excessive pain and suffering to her during the childbirth at normal period and in order to promote the chance of the child living because of the condition of her spine.

The Court: You said at six months.

Mr. Peterson: Seven and a half months, your Honor, seven and a half months.

The Court: I think you had better get the doctor back here. I do not think he is going to testify to that, and I do not want anything in the record as an offer of proof unless I believe that the doctor will so testify so if you want to make an offer of proof bring the doctor back at any time, and I am going to ask questions. I am going to reject it any way for the reason that the pre-trial order does not disclose any of these contentions. Mr. Peterson, you are not an inexperienced lawyer in this court, and you know the rules here, and the rules require specificity with reference to the type of injuries or nature of injuries which the plaintiff sustained; therefore, I will not permit this evidence to be introduced. I made an exception on the part of Dr. Selling although we do have a rule here that when new evidence is brought in which the other party had no opportunity to anticipate, he is entitled to postponement of the trial in order to try to meet that evidence. I did not do that as far as Dr. Selling is concerned, but this type of evidence would, in my

opinion, require me to permit a re-examination of the plaintiff and to give them an opportunity to attempt to meet it. I will take the doctor's testimony at nine-thirty tomorrow morning." (Tr. 130.)

Plaintiff was asked the following question on direct examination:

"Q. Mrs. Walker, have you had a child since May 3, 1953?

A. Yes, I have.

Q. Did you have any difficulty during the pregnancy . . . ?" (Tr. 68.)

A general objection was made, which was sustained, whereupon an offer of proof was made as follows (Tr. 253):

"Q. Mrs. Walker, when did you give birth to the child, your last born child?

A. October 19, 1954.

Q. Was the child earlier than the nine month period of gestation?

A. Yes.

Q. What period of gestation was there?

A. About seven and a half months.

Q. Who was the doctor at that time?

A. Dr. George Lage.

Q. Is he an obstetrician?

A. Yes.

Q. Was there any inducement for earlier premature childbirth?

A. Yes.

Q. Did you have any difficulty with your back or right hip or coccyx during pregnancy?

A. Definitely, yes.

Q. Do you know the reason or relationship of the pregnancy with your difficulty with your back and coccyx and right hip?

A. Yes.

Q. What is the relationship?

Mr. Gearin: We object on the grounds of competency.

The Court: She may answer.

The Witness: Well, as the baby got heavier and the pressure increased on the bone structure in that region it became very painful or sore.

Q. (By Mr. Peterson) Could you wear a back support for it?

A. I couldn't wear a back support because I could not have tightness over my tummy.

Q. Did any doctor prescribe a back support for you?

A. Dr. Abele told me to wear a tight girdle. That was before I was pregnant. I couldn't wear a girdle because of the pregnancy.

Mr. Peterson: No further questions."

which offer of proof was rejected (Tr. 255).

The question raised by the ruling of the court, as set forth above, is whether the pre-trial order was sufficiently broad to permit the introduction of evidence concerning the effect of plaintiff's injuries upon her ability to bear children; either, as a part of the injuries described in said pre-trial order; or, under the physical and mental pain and suffering described therein.

In *U. S. v. Wagner Milk Products, Inc.*, 61 F. Supp. 635, it was held that the rules of civil procedure require only a short and plain statement of the claim, showing that the pleader is entitled to relief; a complaint must allege sufficient facts to fairly apprise the defendant of the nature and basis of the asserted claim and relief requested; ultimate facts and details of evidence are not required to be shown.

Rule 16 FCR of CP provides that the court may hold a pre-trial conference to consider the necessity or de-

sirability of amendment to the pleadings. In this case, a pre-trial conference was held, and defendant at that time had knowledge that plaintiff had been pregnant (Tr. 282), yet made no objection to the wording of the pre-trial order.

Concerning Rule 43 (A), of FCR of CP, it was stated in *N. Y. Life Ins. Co. v. Seegham* (CCA 6), 140 F. 2d 930,

“The statute or rule which favors the reception of evidence governs.”

In *Wright v. Wilson* (CCA 3), 154 F. 2d 616,

“This is a rule of admissibility and not exclusion and the evidence comes in under whichever one of the tests of admissibility is most favored.”

In *U. S. v. Vehicular Parking, Ltd.* (D.C. Del), 52 F. Supp. 751 (quoting 3 Moore, Fed. Prac, Sec. 43.01, p. 3063),

“This rule revolutionizes federal evidence, and, in general, places admissibility upon the sole basis of relevancy and materiality.”

Rule 43 (A) of FCR of CP provides

“ . . . All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.”

In *National Battery Co. v. Levy* (CCA 8), 126 F. 2d 33, the court held that the FCR of CP provide for

the widest admissibility possible under state or federal law, of relevant evidence.

The evidence sought to be introduced is relevant only if the pre-trial order is reasonably interpreted to include a claim for the injuries and physical and mental pain and suffering sought to be proven by the testimony of plaintiff and her doctors, which evidence was excluded; or, if the injuries and physical and mental pain and suffering sought to be proven are of such a nature that they can be said to usually or ordinarily result from the wrongful acts alleged or from the nature and kind of injuries described. *Barron v. Duke* (Ore. 1926), 250 Pac. 628; *Sporable v. Thomas* (Kan. 1934), 33 Pac. 2d 721; *Foster v. Hudson* (Calif. 1939), 92 P. 2d 959; *Aune v. Ore. Trunk Railway* (Ore. 1935), 51 P. 2d 663.

The pre-trial order (Tr. 5), alleged

“severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her . . . back, pelvic area, right hip . . . that plaintiff has permanent injuries to her . . . back, right hip and leg.”

The offers of proof (Tr. 130, 252), made by plaintiff in substance were offers to prove that the pain and suffering, and the stimulation required to cause the untimely birth were caused and necessitated by the injuries resulting from defendant's negligence, and were not an unusual result thereof.

The case of *Denver and Rio Grande Ry. Co. v. James Harris*, 122 U.S. 597, held

“One of the consequences of the wound received by the plaintiff at the hands of defendant’s servant was the loss of the power to have off-spring—a loss resulting directly and proximately from the nature of of the wound. Evidence of this fact was therefore admissible, although the declaration does not in terms, specify such loss as one of the results of the wound.” Citing *Wade v. Leroy*, 61 U.S. 20.

The court said the loss of power to bear children should be considered in assessing plaintiff’s damage, so it would follow that an injury requiring the mother to remain in bed during pregnancy, in order to avoid miscarriage, and requiring that the period of gestation be shortened by one and one-half ($1\frac{1}{2}$) months, would be the proper subject of damage (Tr. 130, 253). 50 A.L.R. 1189; *Hively v. Higgs*, 253 P. 363; *Westfall v. Kern* (Colo. 1935), 43 P. 2d 392.

It is true that the offer of proof as to the medical testimony (Tr. 130), was not made strictly in accordance with the provisions in FCR of CP 43 (C), but in this case the court and defendant agreed that the offer of proof could be made in the absence of the doctor (Tr. 112), and when the court was advised of the substance of the offer, the court stated that in any event the evidence would not be admissible (Tr. 113). *Meany v. U. S.* (CCA 2), F. 2d 538 (cited in 130 A.L.R. 973), held that the making of a formal offer of proof was not an absolute condition of alleging error in the exclusion of evidence. The record shows the significance of the exclud-

ed evidence to be obvious, and the court was fully apprised of plaintiff's position (Tr. 130, 253).

Plaintiff was a female of the age of 34 years (Tr. 39), and had given birth to a child (Tr. 138), and as such her reproductive ability at the time of this accident was as much a part of her as her ability to see. It was a physical function which she had a right to rely upon and in fact did rely upon and utilize (Tr. 68), and defendants admit knowledge of her pregnancy, after the date of her injuries and prior to the trial (Tr. 282). The pre-trial order (Tr. 5) alleged injuries to muscles, ligaments, bones, nerves and soft tissues of her pelvic area. It is certainly of common knowledge that the area described is, anatomically speaking, the portion of the body utilized in conceiving, bearing and giving birth to offsprings.

Gray's textbook of medicine, Vol. 1, Ch. 8, P. 173, Sec. 804,

"The true pelvic area is that portion below the abdomen, incased in bone, muscle, and fascial structures, serving to protect the rectum behind, the bladder in front, the uterus and vagina between . . . The diameters of the brim are of cardinal importance since contraction through errors in development or limitation through distortion following fracture, may lead to disaster preventing the passage of the fetal head during labor."

Sec. 8.05 states:

". . . The two halves of the pelvis are attached by flexible cartilage, permitting motion only through stretching of this structure, particularly of importance during child delivery."

The plaintiff recognizes that the purpose of the pleadings and pre-trial order is to advise the opponent of the issues involved in the case, so as to afford an opportunity to prepare and properly present to the court and jury all of the facts necessary to a complete determination of the rights of all parties involved; but plaintiff contends that the pleadings, pre-trial order, deposition, physical examination and other discovery procedure available to defendants were sufficient to apprise defendants of the claim for injuries sought to be proven, and the surprise, if any, was on the part of plaintiff in not being permitted to introduce evidence of these injuries. Plaintiff alleged injuries to this portion of the anatomy and should have been permitted to establish the effect the the injuries alleged would have upon the usefulness of the organs, tissues, muscles, and other structures that have been specified as injured (Tr. 5).

Moe v. Alsop (Ore. 1950), 216 P. 2d 686 at 690, which was a personal injury action in which plaintiff alleged "crushed and permanently damaged plaintiff's chest and the organs thereof and his abdomen and the organs thereof", defendant sought to have the complaint made more definite and certain, and the court denied this motion on the ground that defendant had a right to have plaintiff examined and if defendant needed further information to enable him to prepare a defense, the information would be obtained by such examination, and the court said,

"the ends of justice do not require plaintiff to set forth, in answer to a demand for a bill of particulars, a minute description of the physical injuries

suffered . . . In many instances the plaintiff would not be able minutely and technically to describe his injuries.”

In *Green v. McGaughly* (D.C.T., SD., 1940), 1 Fed R. Dec. 604, the complaint stated “and he was otherwise injured.” The court held this allegation was not subject to motion to strike or make definite and certain, for if defendant needed further information, he could obtain it by use of discovery procedure. In support of this position, plaintiff cites: *Braden v. Callaway*, 4 FRD 147 at 148; *Randolph v. McCoy*, 29 F. Supp. 978 at 979, and *Clyde v. Broderick* (CCA 10, 1944), 144 F. 2d 348, where the court said:

“ . . . It should be observed that the pleader is not required to do more than make a ‘short and plain statement of the facts upon which he relies to establish his claim. *Garbutt v. Blanding Mines*, 141 F. 2d 679; *Pliner v. Nesvig* 42 F. Supp. 297; *C. F. Mumm v. Jacob E. Decker & Sons*, 301 U.S. 168. More than that constitutes a breach of the rules of simplicity, conciseness and directness, which is the spirit of modern pleading . . . All doubts and ambiguities concerning the meaning and intendment of the pleader’s language must be resolved in favor of the claim attempted to be stated, and if the language employed to state the claim is not sufficiently definite and particular to enable the adversary to prepare his responsive pleading or to prepare for trial the remedy is a motion for a more definite statement or a bill of particulars under Rule 12 (E) of the FCR of CP.”

In *Burton v. Weyerhaeuser Timber Co.*, 1 FRD 571, which was a case tried in the same court as this case, the court stated,

"The prime objective of the new rules of civil procedure is to eliminate surprise as a trial tactic, one can hardly imagine a greater breach of the spirit of the new rules than to deny an injured man the right to show by the doctor attending him the fullest circumstances of his case."

In *Brooklyn Heights Ry. Co. v. Mac Laury*, 107 F. 644, the court said,

"Injury to eyesight may be proved under a complaint alleging that plaintiff was hurled forward with such force as to bruise her knee, wrench her arm, and otherwise seriously and grievously injured her."

In *Safeway Cab Service Co. v. Minor*, 70 P. 2d 76, the court said, "considering our liberal system of plead- and procedure in view of plaintiff's sex and the nature of the accident", no error was committed in permitting the introduction of evidence of disturbance of the menstrual function of plaintiff, where such injury was not specifically pleaded.

In the case of *Samuels v. Calif. St. Cable Co.*, (Calif. 1899), 56 Pac. 1115, there were no allegations of specific injuries, but evidence was introduced of urinary trouble, the court said, "Such evidence was admissible under the general averment of bodily injury and resulting damage", and cited *Denver Ry. v. Harris*, 122 U.S. 597. *Jordan v. Great Western Motorways* (Calif. 1931), 2 P. 2d 786.

It is plaintiff's position, based on the foregoing, that, as expressed in 68 A.L.R. 481-500, the court was confronted with conflicting consideration: (1) That plain-

tiff be allowed to recover all that she is fairly and justly entitled to, under a fair and just interpretation of her pleading: and, (2) That defendant be given a fair chance to know in advance the elements of plaintiff's claim, so as to enable him to prepare his defense accordingly and not be taken by surprise at the trial.

It has been our purpose to show that in this instance defendants had no legal basis for a claim of surprise (Tr. 131) in connection with the introduction of this evidence. In the first place, it is our contention that the pre-trial order (Tr. 5), itself, contained express notice of this injury, secondly, that defendants had available the discovery procedure for ascertaining the extent of plaintiff's injuries, and that if defendants failed to exercise that procedure, though we believe the procedure was exercised, this plaintiff should not be denied a right to fully disclose her injuries and the significance thereof, because the defendants might have been lax in the preparation of their defense.

Plaintiff's next contention is that the court erred, and plaintiff was prejudiced thereby, in its ruling regarding the testimony of Orville Noble Jones, a medical expert testifying on behalf of defendants.

Dr. Jones was called by defendants, out of turn, during plaintiff's case in chief, by stipulation of counsel and with the approval of the court (Tr. 140).

Dr. Jones was duly qualified and was asked on direct examination, by defendants, the following questions (Tr. 141):

“Q. Dr. Jones did you at my request conduct a physical examination of Mrs. Dorothy S. Walker?

A. Yes, sir, I did.

Q. Did you during the course of your examination cause X-ray photographs to be made of this lady's person?

A. Yes.

Q. Will you relate to the jury what this lady told you with reference to how she got hurt?

A. Yes.”

at which time plaintiff entered an objection, “on the ground that it is not a history relating to the witness as a treating doctor” (Tr. 142); to which the court answered: “This is an adverse witness, Mr. Peterson. The objection is overruled.” The witness then testified in substance as follows (Tr. 142): that her car rolled down a 60-foot embankment; that she attracted the attention of passersby; that she carried out limited physical activity due to her tuberculosis. She admits freely a prior accident about one and a half years before this accident, at which time there was a fractured rib on the left side (Tr. 144).

That the statements referred to as a part of the history are contrary to plaintiff's testimony in that: plaintiff does not contend her vehicle rolled (Tr. 177); plaintiff contends the first man at the scene was attracted by the lights from her vehicle (Tr. 45); that the limitation on her activity is largely due to these injuries (Tr. 49); that she was under the impression she had a broken rib, but discovered she had not (Tr. 56).

Plaintiff feels she has been prejudiced by the foregoing testimony in that the credibility of her testimony

was thereby attacked, and that the statements were made for the purpose of impeachment, without a proper foundation for that purpose having been laid.

In support of the contention that the objection should have been sustained, plaintiff cites the case of *Atlantic Coast Line R. Co. v. Dixon* (CCA 5, 1953), 207 F. 2d 899.

"The rule in Georgia and generally in the Federal Courts is that a physician's testimony as to statements of pain and suffering made by a patient to a physician not for the purpose of treatment but to qualify the physician to testify as an expert witness are generally inadmissible."

Citing 67 A.L.R. 34, 80 A.L.R. 1530 and 130 A.L.R. 987, and the rule in Oregon as contained in the case of *Reid v. Yellow Cab Co.*, (Ore. 1929), 279 Pac. 635, cited in 67 A.L.R. 1,

"A physician consulted by plaintiff in an action for personal injuries, for the purpose of qualifying him to testify, may not, in testifying, repeat what the plaintiff told him as to how the accident occurred, or as to past suffering and nervousness."

Plaintiff next contends the court erred in failing to instruct the jury, as request by plaintiff in writing,

"You are instructed that under the Standard Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not." (Tr. 11.)

Plaintiff was prejudiced by the court's failure to give that instruction, for the reason that, as stated in *Frangos*

v. Edmunds (Ore. 1946), 173 P. 2d 596, where there is substantial evidence of permanent injury the Standard Mortality Tables may become admissible. The case holding that life expectancy is not determined alone by the Standard Mortality Table, but the life expectancy based thereon is evidence to be considered, together with "all other relevant testimony such as age, sex, health, habits, physical condition of the plaintiff, and the nature of his employment, whether hazardous or not."

Plaintiff contends the court committed prejudicial error in its charge to the jury, in that the court advised the jury that the court would advise the jury as to what portions of the charge constituted comment (Tr. 257). Plaintiff makes no claim that the court has not the right to comment upon the evidence, but plaintiff contends the jury was misled by the court into believing that unless the court specified its charge as comment, that the charge would be a matter of law, and the jury would be bound thereby in reaching its decision upon the facts and the law.

In its charge to the jury, the court stated "a judge of the Federal Court has the privilege of commenting on the evidence. If I do so in this case I shall tell you what portion of my instructions constitute comment" (Tr. 257).

Plaintiff contends the following excerpts from the court's instruction constituted comment, and the court failed in each instance to tell the jury that said excerpts were comment:

“Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx. (Tr. 265.)

“The greater a person’s interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

“Manifestly, she has a vital interest in the outcome of the case. This interest is one of the matters you may consider along with other attendant circumstances in determining the credence you will give to her testimony” (Tr. 269).

As to the comment regarding testimony of permanency (Tr. 265), plaintiff further contends it is abstract and misleading, in that it is improperly worded, and tends to confuse the jury.

As to the comment concerning plaintiff’s interest (Tr. 269), plaintiff contends it was biased, partial and inequitable, upon the ground and for the reason that defendants were equally interested in the outcome of the litigation; that the jury could recognize the bias indicated therein and be mislead thereby. Plaintiff further contends that the instruction was more than a comment upon the evidence, but was, in truth and in fact, an invasion of the province of the jury, in that the jury is the sole and exclusive judge of the credibility of all witnesses, including the litigants, who participate as witnesses. 53 Am. Jur. 80 Trial, Sec. 82.

Plaintiff contends the jury was guilty of misconduct in awarding plaintiff the sum of only \$1500, for the reason that, as the court instructed (Tr. 266),

“ . . . Therefore if you find for the plaintiff, you may allow her the sum of \$956.13 for medical and hospital expenses, and that is in addition to the amount you allow her for general damages.”

As to the allowance of general damages, the following was to be considered by the jury: Plaintiff was a female, 34 years of age, who has suffered from tuberculosis, that at the time of her injuries was arrested (Tr. 39), that as a result of the accident, she lost consciousness (Tr. 44), coughed blood (Tr. 47), crawled an embankment (Tr. 44), had headaches and muscle spasms (Tr. 47), was a hospital patient in traction for a period of two and a half weeks (Tr. 48), had suffered spells of dizziness and fainting for a period of nearly two years (Tr. 49), was a patient in a tuberculosis hospital for seven weeks (Tr. 50), has a sprained neck and low back (Tr. 89), a displaced coccyx (Tr. 95), would probably require fusion of the back and removal of the coccyx (Tr. 98), which would require hospitalization for six weeks and wearing of a cast for three months (Tr. 99), would have pain for the remainder of her life (Tr. 102), that she had temporary brain damage (Tr. 122), a concussion, post traumatic headache and dizzy spells, numbness and uncoordination of arms (Tr. 119), and that she had a bleeding lung (Tr. 136).

It is the position of plaintiff that the jury failed to follow the instruction of the court concerning damages (Tr. 266), and that there has been an evident failure of

justice to the plaintiff in this regard, which reasons have been recognized as a basis for the setting aside of the verdict and the granting of a new trial, 15 Am. Jur. 664, Damages, Sec. 231.

In finding for plaintiff the jury was obligated to award plaintiff, in addition to the plaintiff's special damages of \$956.13, a reasonable sum to compensate her for her injuries, temporary and permanent, physical and mental (Tr. 266). Generally, those injuries have been described above, and it is apparent that the sum of less than \$550.00, is grossly inadequate for the injuries described; however, in addition to this, plaintiff contends, as argued herein, that the court should have permitted the introduction of evidence concerning the physical and mental pain and anguish surrounding the birth of her child, as well as the necessity of falsely stimulating the birth of that child after only seven and a half months of pregnancy (Tr. 253).

Plaintiff contends, for the reasons stated: that the jury failed to award a reasonable sum for the injuries which were shown by the evidence; and that the court refused to permit plaintiff to prove all of her injuries, that the verdict should be set aside, and a new trial should be granted.

In the case fo Kaufman v. Atlantic Greyhound Corp. (DC W. Va.), 41 F. Supp. 252, it was held that a motion to set aside the verdict and for a new trial should be granted to prevent a miscarriage of justice. And though it is conceded by plaintiff that the granting of a motion for new trial is largely a matter of discretion with the

trial court, the refusal of the trial court can properly be assigned as error on appeal from a final judgment subsequently entered, *Marshalls U. S. Auto Supply, Inc. v. Cashman* (CCA 10), 111 F. 2d 140.

In the instant case, plaintiff recovered the sum of \$1500.00, in a judgment filed February 28, 1955 (Tr. 9A), and filed a motion for a new trial on March 7, 1955 (Tr. 14), assigning as error the failure of the court to permit plaintiff to introduce evidence of all of her injuries, the court's refusal of plaintiff's offer of proof of said injuries, the court's failure to instruct the jury as to plaintiff's life expectancy, as found in the Standard American Mortality Tables, the jury's misconduct in failing to follow the court's instructions as to damages, and the inadequacy of the verdict (Tr. 10).

Said motion was argued and on March 21, 1955, the same was denied (Tr. 14).

Plaintiff contends the court could well have denied said motion on any one of the errors assigned, but in considering all of the errors together, it is apparent that there has been a manifest miscarriage of justice for the reason that in finding for plaintiff it was necessary that the jury find the defendant guilty of negligence, as charged, and that defendant's negligence was the proximate cause of plaintiff's injuries, which were shown by plaintiff to be severe and permanent and have been fully described herein.

Plaintiff has argued the court's error in refusing to permit her to establish the full nature and extent of injuries received, and the effect thereof upon her repro-

ductive system, and she seeks a new trial, for the purpose of permitting her to present to the court and jury all of the material facts, within the issues of the pre-trial order, as set forth at the commencement of her argument of this case.

We submit the judgment should be set aside and a new trial of this cause ordered.

Respectfully submitted,

PETERSON & POZZI and
BURTON J. FALLGREN,

By NELS PETERSON and
BURTON J. FALLGREN,
of Attorneys for Appellant.

No. 14788

In the

**United States Court of Appeals
For the Ninth Circuit**

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC.,
a corporation, and M. L. BURR,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
JOHN GORDON GEARIN
JOSEPH LARKIN

800 Pacific Building
Portland 4, Oregon

Attorneys for Appellees

FILED

DEC 21 1955

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No. 14788

In the

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DOROTHY S. WALKER,

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vs.

WEST COAST FAST FREIGHT, INC.,

a corporation, and M. L. BURR,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

JURISDICTION

This is an action for damages for personal injuries alleged to have been sustained by appellant through the negligence of appellees (Pretrial Order Tr. 3 et seq.). The appellant is a citizen of the State of Oregon (Tr. 3), appellee West Coast Fast Freight, Inc., is a citizen of the State of California (Tr. 3), and appellee M. L. Burr

is a citizen of the State of Washington (Tr. 4). The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00 (Tr. 4).

The action was removed by the appellees to the United States District Court for the District of Oregon pursuant to 28 U.S.C.A., Sections 1332 and 1441 (Tr. 4).

This court has jurisdiction by virtue of 28 U.S.C.A., Section 1291.

APPELLEES' STATEMENT OF THE CASE

Appellees agree with the factual portion of appellant's statement of the case; however, a portion of appellant's statement is argumentative, i.e. the nature and extent of appellant's injury and damage.

There was a dispute as to the extent and permanency of appellant's injuries. This dispute was observed by the trial court in discussing appellant's motion for a new trial where, in replying to appellant's counsel's assertion that the damages awarded were inadequate, Judge Solomon said (Tr. 285):

"Mr. Peterson, this is a consistent verdict if the jurors did not believe some of your own physicians because I believe it was perfectly proper for the jury to come to the conclusion that this woman was suffering from tuberculosis but that her condition had not been aggravated a great deal or at all by the acci-

dent. The testimony was that she coughed up a little blood within a very short time, and there was quite a disagreement at that time between her testimony and the medical and the hospital reports as to the quantity of blood. Likewise, I thought your medical testimony was very weak, particularly testimony of Dr. Selling. That was better testimony for the defendant. I do not see how on the basis of the testimony of your physicians the jury could have allowed her a great deal. Her testimony was much better as to the amount of disability. I did not think that it was supported by the medical testimony.”

QUESTIONS PRESENTED

1. Did the court err in refusing to allow appellee to show pain and suffering she claims to have had with a pregnancy which occurred subsequent to the accident when the appellant in the pretrial order did not make a claim in that regard? (Appellant's Specifications of Error I, II and III; Ap. B. 5, 6).

2. Was appellant's explanation to Dr. Jones, who examined her at the request of appellees for the purpose of preparing him to testify, as to how the accident happened, admissible in evidence?

3. Did the court err in refusing to instruct the jury on the life expectancy of a person the same age as appellant? (Appellant's Specification of Error V; Ap. B. 8, 9).

4. Did the court prejudice the appellant by the instructions which explained the issues and told the jury that appellant had a vital interest in the case? (Appellant's Specifications of Error VI and VII; Ap. B. 9, 10).

5. Was the jury's award of \$1,500.00 grossly inadequate as a matter of law? (Appellant's Specification of Error VIII; Ap B. 11).

6. Did the court err in refusing to grant a new trial to appellant on the grounds stated? (Appellant's Specification of Error IX; Ap. B. 11).

SUMMARY OF ARGUMENT

I.

The court did not err in excluding evidence of claimed suffering during appellant's subsequent pregnancy for the reason that the subject was not mentioned or claimed by appellant in the pretrial order.

Under the practice of the United States District Court for the District of Oregon, a party at the time of pretrial must apprise his adversary of all contentions he intends to make at the trial, including *evidentiary* contentions.

II.

Appellant's explanation to Dr. Jones of how the accident happened was admissible as a statement against

interest. It was not a self-serving account given to her own doctor and inadmissible for that reason.

III.

The court committed no error in failing to instruct the jury on the life expectancy of a person the same age as appellant, since the evidence showed that appellant was suffering from tuberculosis.

Further, appellant could not have been prejudiced by the court's failure to so instruct, since from the size of the verdict the jury did not believe appellant was permanently injured. Therefore, the life expectancy of appellant was immaterial.

IV.

The court's instructions to the jury were fair and correct.

V.

The jury's verdict was not inadequate as a matter of law in view of the evidence.

VI.

The court did not err in refusing to grant a new trial.

ARGUMENT

I.

The trial court did not err in failing to permit appellant to testify concerning the pain she claims to have suffered in a pregnancy which occurred subsequent to the accident involved in this case.

Such a claim was not made by appellant in the pretrial order, and when appellant, for the first time on trial, made this contention, the appellees were taken by surprise. Appellant did not ask for a continuance to permit appellees to have appellant examined further by a physician in light of this new claim.

It is the practice of the United States District Court for the District of Oregon, with which this court is familiar, to utilize pretrial procedure in every case. In the usual case, counsel agree upon a pretrial order which is, in effect, a consolidated pleading which sets forth the contentions of each party and the issues to be tried. The pretrial order, in this case dated nine days before trial, stated (Tr. 7):

“... that the pretrial order supersedes all pleadings;”

Under this practice, the contentions of each party stated in the pretrial order must be more particular

and exact than the allegations of a complaint under the old code pleading practice.

In the case of *Burton v. Weyerhaeuser Timber Co.*, (D.C. Ore. 1941), 1 F.R.D. 571, 4 F.R.S. 16.32, Case 2, it appeared that plaintiff claimed in the pretrial order that he had been burned by muriatic acid through the negligence of defendant. Without disclosing its intention to do so in the pretrial order, the defendant proved upon trial:

- (1) that plaintiff had actually been burned by sulphuric acid;
- (2) that muriatic acid is harmless.

The court granted a new trial to plaintiff because he was taken by surprise by this evidence. Judge McCulloch observed:

“Parties are expected to disclose all legal and *fact* issues which they intend to raise at trial, save only such issues that may involve privilege or impeaching matter . . .

“. . . I can sympathize with the desire of counsel, experienced in the older forms of practice, to withhold disclosure of such dramatic issues until the midst of trial, but it must be made clear that surprise, both as a weapon of attack and defense, is not to be tolerated under the new Federal procedure . . .

“Faithfully administered in spirit, as my senior colleagues and I are endeavoring to administer them, the new rules outlaw the sporting theory of justice from Federal courts.” (Emphasis added)

In the case of *Curto v. International Longshoremens & W. Union*, (D.C. Ore. 1952), 107 F. Supp. 805, Judge Fee discussed the pretrial procedure of the District of Oregon and particularly the use and effect of the pretrial order. Judge Fee said:

“The first purpose of these orders is to do away with the delays of common law and code pleading, to define the issues, both ultimate *and evidentiary*, to eliminate false issues and to guarantee that the controverted questions are in good faith contested.” (Emphasis supplied)

See also the cases of *Clark v. United States*, (D.C. Ore. 1952), 13 F.R.D. 342, 8 F.R.S. 16.21, Case 1; *Byers v. Clark & Wilson Lumber Co.*, (D.C. Ore. 1939), 27 F. Supp. 302.

Appellant's assertion that appellees had the privilege of all the discovery procedures of the federal rules (Ap. B. 13) does not aid her because, as the above authorities indicate, a party has an absolute duty to disclose his contentions. His adversary has no duty to discover them or to speculate on *possible* contentions.

Appellees have, in the abstract, no quarrel with the authorities discussed by appellant at pages 18 and 19 of her brief concerning the admissibility of evidence. However, the question here is not whether the evidence was competent; it is the question of relevance. This is

admitted by appellant at page 19 of her brief where she states:

“The evidence sought to be introduced is relevant only if the pretrial order is reasonably interpreted to include the claim . . .”

No such interpretation of the pretrial order is possible. No such claim is made.

It further appears that even if the evidence were admissible under the pretrial order, a proper offer of proof was never made of medical testimony on this subject. During the close of counsel's offer of proof as to what Dr. Abele would have said (Tr. 130-131), the court instructed counsel for appellant to secure the doctor's presence and have him testify in accordance with the offer of proof (Tr. 130-131). Counsel for appellant later advised the court that Dr. Abele could not testify in accordance with the offer of proof and appellant had summoned no doctor who could. This is disclosed by the discussion between the court and counsel for appellant during the argument of the motion for new trial (Tr. 283):

“The Court: Then you tried to get it in on the testimony, and I said you could not do it in that way, in any event, and you said that you wanted to make an offer of proof. In the first place, I told you to call the doctor back, but then you told me that for the

first time you learned that he was not the doctor who could testify to that.

Mr. Peterson: *That is right.*

The Court: Then you said that the only doctor that could testify would be the obstetrician and you would try to get hold of him.

Mr. Peterson: *Correct.*

The Court: Mr. Peterson, you came here trying to make an opening statement on a subject matter about which you had never talked to a physician, did you not?

Mr. Peterson: No, your Honor.

The Court: When had you talked to the obstetrician?

Mr. Peterson: I received a letter from the obstetrician dated August 9, 1954, and I will read that letter to the Court.

The Court: *Had you made arrangements for the obstetrician to come into court?*

Mr. Peterson: *No, I had not, your Honor.*" (Emphasis supplied)

It is therefore obvious that the appellant could not have been prejudiced by the claimed exclusion of the evidence. In fact, there was no such evidence.

II.

The court did not err in allowing Dr. Jones to tell the jury the story of the accident which appellant related to him.

Appellees do not dispute the general rule stated by appellant at pages 25-27 of her brief to the effect that a doctor who examines an injured person for the purpose of preparing himself to testify and not for the purpose of treatment cannot tell the jury the story of the injured person as to how he was hurt. But, this rule applies only if the doctor is engaged by the party producing him as a witness and does not apply if the doctor is engaged by his adversary.

The reason for the general rule is obvious. A person should not be allowed to consult a doctor for the purpose of preparing the doctor to testify, at that time giving the doctor a self-serving account of how the injuries were sustained and then get the self-serving statement to the jury through the doctor.

However, the reason for this rule vanishes when the doctor involved is engaged by the injured person's adversary. In that event, anything which the person states which is unfavorable to his cause is a statement against interest. See the annotation in 67 A.L.R. at page 39, which annotation is cited at page 27 of Appellant's Brief, where it is noted that the cases universally

held that the statements of a party made to a doctor examining him at the instance of his adversary are admissible.

III.

There is no merit in appellant's contention that the court prejudiced her in failing to include an instruction on the mortality tables in the charge to the jury.

The evidence is uncontradicted that appellant was suffering from "pulmonary tuberculosis, moderately advanced, still considered active. She also had a partial collapse of her left lung by air treatments." (Tr. 124, Appellant's doctor, Dr. Tuhy.)

In the Oregon case of *Frangos v. Edmunds*, 179 Or. 577, 173 P.2d 596, the court discussed the admissibility of the mortality tables in a personal injury case (at page 604 of the official report) saying:

"Where there is *substantial* evidence of permanent injury, the standard mortality tables *may become* admissible at least *if earning power is permanently impaired*." (Emphasis supplied)

It was held that failure to give such an instruction did not constitute reversible error.

In the present case, there was little if any real evidence of permanent injury and appellant's earning power was not an issue.

Further, it is obvious from the size of the verdict that the jury did not believe appellant's claims, and, consequently appellant's life expectancy would have been immaterial to the jury and could have had no influence upon it.

The appellant was not prejudiced by the court's failure to give the mortality table instruction.

It further appears that appellant failed to object to the court's failure to give the mortality instruction (Rule 51 of the Federal Rules of Civil Procedure) (Tr. 274).

Because she did not object, appellant may not now assign as error the failure of the trial court to instruct on the mortality tables.

IV.

The court's instructions did not prejudice appellant.

The court's complete charge to the jury commences at page 256 of the transcript. Appellant has taken two parts of the charge out of the context and claimed error for them. However, the instructions considered as a whole were fair to appellant.

One statement of the court which seems to offend appellant was the court's advice to the jury that there was a conflict in the evidence as to whether there was

any permanent injury to appellant's back and coccyx (Tr. 265). The court did not comment one way or the other on this subject other than to point out to the jury that it would have to decide the question (Tr. 265).

The other matter which troubles appellant was the court's advice to the jury that appellant had a vital interest in the case and that the jury could consider this in weighing appellant's testimony. The court's entire charge regarding the manner in which the jury should test the credibility of witnesses is correct and proper (Tr. 267-272). The court's statement to the jury that the plaintiff had a vital interest in the outcome of the case was obviously true and the court may advise the jury of that fact. Appellant has produced no authorities to the contrary (Ap. B. 39).

It further appears that appellant may not assign the above-mentioned instructions as error on this appeal since no objection to the giving of the above instructions was taken by counsel for appellant pursuant to Rule 51 of the Federal Rules of Civil Procedure.

Rule 51 states:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The only objection of appellant to the court's instructions appears at page 274 of the transcript where appellant complained about the court's failure to give an instruction to the effect that,

“ . . . if the weaker or less satisfactory evidence is produced when it appears that a stronger and more satisfactory can be produced, such evidence is to be viewed with distrust.”

The court then advised counsel that he could have an exception (Tr. 274) and counsel for appellant then replied, “With that, the plaintiff has no other exceptions.” (Tr. 274)

It is obvious from the foregoing that since appellant did not object to the court's instructions relating to the conflict of evidence as to injuries and appellant's interest in the outcome of the case, appellant may not now complain that the court erred in instructing on those matters.

V.

The verdict was adequate based on the record in this case.

The trial court, in his discussions with counsel for appellant at the hearing on the motion for new trial in this case, stated the matter more succinctly than appellees could attempt here, as follows (Tr. 285-287):

“Mr. Peterson: My third main point, your Honor, is inadequacy of the verdict. The testimony was that she had occurred 956 dollars, some-odd, special damages, but the jury gave her \$1,500. I submit that under the decided cases such a verdict is inadequate, and in the Federal Court, as I understand it, grounds for granting a new trial are—(5)

“The Court: Mr. Peterson, this is a consistent verdict if the jurors did not believe some of your own physicians because I believe it was perfectly proper for the jury to come to the conclusion that this woman was suffering from tuberculosis but that her condition had not been aggravated a great deal or at all by the accident. The testimony was that she coughed up a little blood within a very short time, and there was quite a disagreement at that time between her testimony and the medical and the hospital reports as to the quantity of blood. Likewise, I thought your medical testimony was very weak, particularly testimony of Dr. Selling. That was better testimony for the defendant. I do not see how on the basis of the testimony of your physicians the jury could have allowed her a great deal. Her testimony was much better as to the amount of disability. I did not think that it was supported by the medical testimony.

“Mr. Peterson: Your Honor, if I may, here is what the doctors testified, as I recall it. Dr. Tuhy testified that she had scar tissue on her lungs; that she had a bruised lung as a consequence of this accident, and because of the scar tissue she had bled into the lung, bled into the lung, and that was one of the primary reasons that he hospitalized her for seven weeks at the University Hospital to check to see if there had been exacerbation or aggravation of the tuberculosis, (6) but he thought there was no dissemination of tuberculosis and that she had no permanent injury of the lung.

“Dr. Selling, a neurosurgeon, testified she had a brain injury.

“The Court: Mr. Peterson, you did not listen to his testimony. He did not say that she had a brain injury.

“Mr. Peterson: I should submit, your Honor, he said as evidence by the tests which he did, neurological tests, which had disappeared at the time of the trial, which were residual, the headaches which he thought would disappear within two or three years. That was the essence of Dr. Selling’s testimony.

“Dr. Abele testified she had a lumbosacral sprain. It was permanent. It would require reasonably, probably, that she would have to have a spinal fusion; that she had a coccyx injury which would require surgical removal.

“The only adverse testimony medically was that of Dr. Jones, and Dr. Jones said that upon the business occupation from the plaintiff’s standpoint, his testimony is that she had a painful coccyx and a painful hip upon his examination. Otherwise, he said he found no objective symptoms of injury.

“Now that is from the worst and the best standpoint of the medical testimony. I submit that it is inadequate.

“The Court: I realize that the plaintiff did not get the verdict that she anticipated getting, and it may very well be that some of the liability elements played a part, but under (7) the decisions I do not believe that the plaintiff is entitled to have a judicial declaration that there is inadequacy in damages because, had the jury believed the testimony of Dr. Jones, they could have found that the plaintiff suffered damage to \$1,500 or perhaps even less. I do not think that this is a case in which I should

disturb the verdict of the jury, and the motion is denied.”

Judge Solomon’s comments fully answer appellant’s contention.

Exemplifying the conflict in the evidence concerning the extent of appellant’s injuries are the following statements of the doctors who testified.

Doctor Selling, who specializes in internal medicine and neurology, was called by appellant (Tr. 113). He testified (Tr. 121-122):

“Q. Is it your opinion, Doctor, that the headaches will persist for a period of time in the future but then will clear up?

A. That is correct.

Q. Do you have an opinion as to whether or not she has any permanent brain damage?

A. I believe not.

. . .

Q. Then, Doctor, would you characterize this as being temporary brain damage?

A. Precisely.

Q. Doctor, will this patient require any further medical (90) care in respect to that injury?

A. No.”

This, from appellant’s own witness and in view of her statement in the pretrial order that she suffered “severe brain concussion and brain damage” (Tr. 5).

Dr. Tuhy was called by appellant (Tr. 123). Dr. Tuhy testified (Tr. 135):

“Q. Did this injury affect her tuberculosis?

A. In my opinion, it did not adversely affect the cause of her tuberculosis . . .”

and (Tr. 136):

“Q. Doctor, do you have an opinion as to whether or not there has been any dissemination of the tuberculosis?

A. No, I think not . . .”

and (Tr. 137-138):

“Q. Doctor, I note here, these are your reports from your office, it is your impression under date of April, 1953, as follows, and I am going to read it, and you will correct me if I am reading it wrong:

‘In my opinion, this patient sustained contusion of the lung in her automobile accident of 5-3 which does not seem to have adversely affected the pulmonary tuberculosis. From the chest (107) standpoint, she would have no permanent disability as a result of the accident.’

That is contained in your record file; is it not, doctor?

A. Yes.

Q. That is correct, is it not?

A. I believe that to be true.”

This is appellant's own witness and is most significant in view of her contention in the pretrial order dated nine days prior to the trial (Tr. 6) that appellant "will be permanently affected with the results of aggravation and dissemination of said tuberculosis . . ."

Dr. Jones, who was called by appellees (Tr. 141) summed up his opinion as to appellant's claimed injuries as follows (Tr. 151-152):

"Q. From the history that you have received from Mrs. Walker, your examination and your study of the X-ray pictures, do you have an opinion as to whether or not these conditions as you now find them will or will not be permanent?

A. They should be taken one by one.

Q. All right, if you will, doctor, please.

A. No. 1: The chief complaint at the present time, that of painful coccyx, the history is there, the patient's story is there, the subjective complaint is there, and I will not deny a painful coccyx. It is now some fifteen to eighteen months after the injury. The condition of painful coccyx commonly is a protruded one, is difficult to treat and is prolonged, but I never have yet seen one that did not respond in time to the proper measures and was not ultimately relieved. In other words, I do not believe that the condition is a permanent one that she will carry with her for the rest of her life. (124)

No. 2, the painful hip: This is of mild nature. There is nothing in the X-ray to suggest that there is any permanent damage to the hip joint; Therefore, I must assume that the condition is a relatively minor persisting involvement of the muscles and ligaments about the hip joint, and if it is such and in the

absence of any arthritis of the hip, it will disappear in time.

Third and fourth, the neck and the lower back: The complaints are there; the objective findings are not there. I am unable to ascertain any disability at the present time as regards the neck and as regards the lower back."

Appellant's contention in the pretrial order was (Tr. 6) "that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest . . ."

The evidence outlined above demonstrates that the verdict was not inadequate and as stated by the trial court (Tr. 278), "Had the jury believed the testimony of Dr. Jones, they could have found that the plaintiff suffered damage to \$1,500.00, or perhaps even less."

VI.

Since the trial court committed no error in the trial of this action, as pointed out above, the court did not err in failing to grant appellant's motion for a new trial.

The judgment must be affirmed.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

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JOSEPH LARKIN,

Attorneys for Appellees.

No. 14789

United States
Court of Appeals
for the Ninth Circuit.

MICHAEL R. PLASTINO and RUTH C. PLASTINO,

Appellants,

vs.

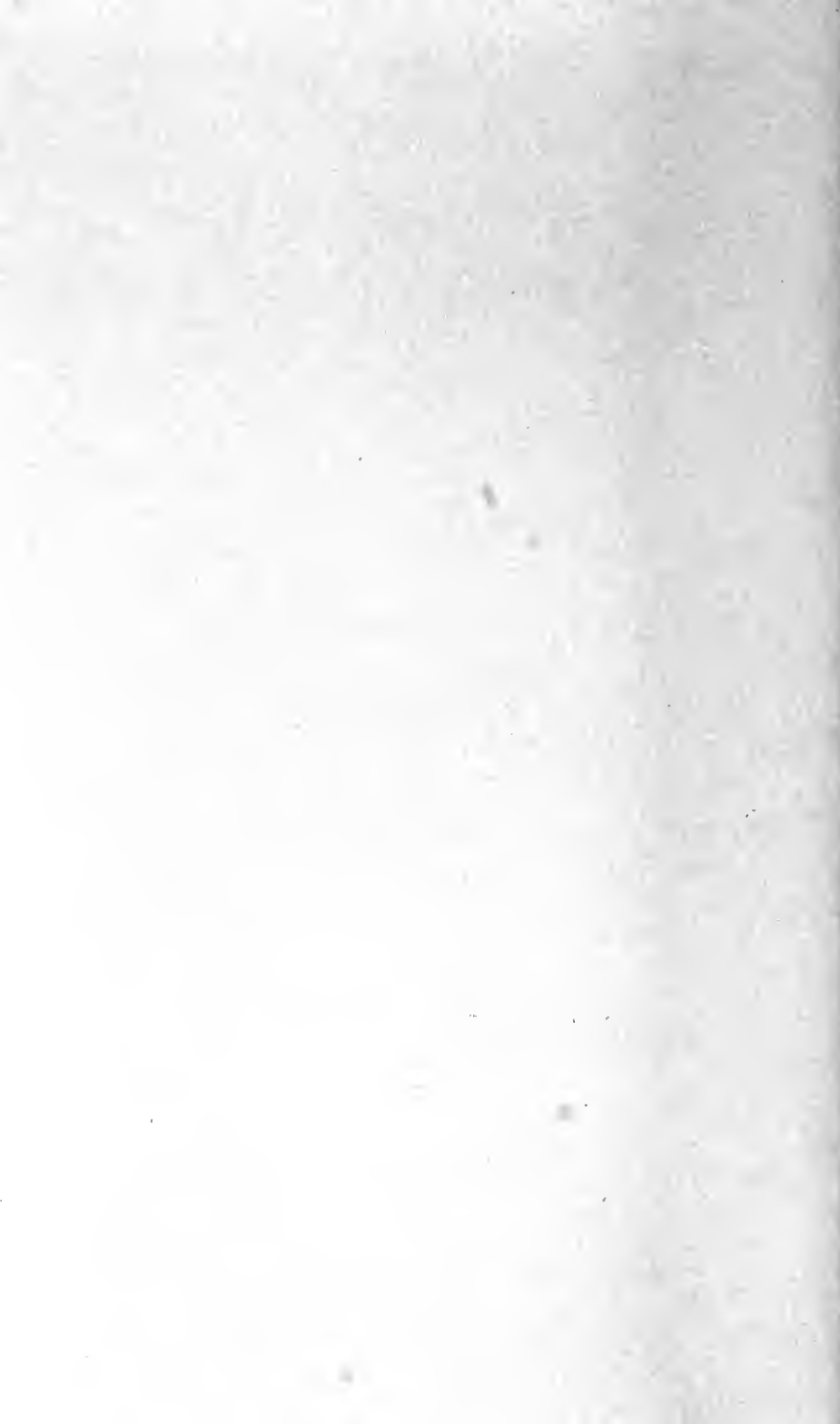
ESTBER MILLS and EDNA MILLS, Husband and Wife; RAY DOUGLAS and PAULINE DOUGLAS, Husband and Wife; SIGMUND WENDLING and DOROTHY WENDLING, Husband and Wife; LORAN D. HARVESTON; LYLE SIMMONS, GEORGE HODGDON, C. K. WARREN and OSCAR TITTLE,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

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No. 14789

United States
Court of Appeals
for the Ninth Circuit.

MICHAEL R. PLASTINO and RUTH C. PLASTINO,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, Husband and Wife; RAY DOUGLAS and PAULINE DOUGLAS, Husband and Wife; SIGMUND WENDLING and DOROTHY WENDLING, Husband and Wife; LORAN D. HARVESTON; LYLE SIMMONS, GEORGE HODGDON, C. K. WARREN and OSCAR TITTLE,
Appellees.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by **printing in italic** the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. 7293

MICHAEL R. PLASTINO and RUTH C. PLAS-
TINO, Husband and Wife,

Plaintiffs,

vs.

ESTBER MILLS and EDNA MILLS, Husband
and Wife; RAY DOUGLAS and PAULINE
DOUGLAS, Husband and Wife; SIGMUND
WENDLING and DOROTHY WENDLING,
Husband and Wife; LORAN D. HARVES-
TON; LYLE SIMMONS; GEORGE HODG-
DON; C. K. WARREN; and OSCAR TITTLE,

Defendants.

PRETRIAL ORDER

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the above-entitled action came on for pretrail conference before the Honorable, the Judge of the above-entitled court, on the date and at the hour subscribed hereto.

I. Appearances:

The plaintiffs appeared in person and by one of their attorneys, Robert R. Rankin; the defendants Estber Mills and Edna Mills, Ray Douglas and Pauline Douglas, Sigmund Wendling and Dorothy Wendling, Loran D. Harveston, Lyle Simmons, C. K. Warren and Oscar Tittle appeared by George P.

Winslow and William C. Ralston, their attorneys; defendant George Hodgdon appeared by Irving Rand, one of his attorneys.

II. Statement of Nature of Case:

Plaintiffs, as assignees of a contract for a deed to purchase the hereinafter described lands in Tillamook County, State of Oregon, from defendant Mills, seek specific performance of the modified contract to give a good and sufficient deed of conveyance to said property, described as follows:

All that part of the Southeast Quarter of the Southwest Quarter of Section 22, Township One North, Range 10 West of the Willamette Meridian lying East of the State Highway.

Also known as Lot 8 in Section 22, Township One North of Range 10 West of the Willamette Meridian, less $1\frac{1}{4}$ acres heretofore conveyed to Pacific Railway and Navigation Company, containing in all 43.46 acres, more or less.

To secure title thereto and the protection thereof, plaintiffs have deposited in this court \$925.90 as the unpaid balance of the full purchase price and asked that the same be reduced at the prorata rate per acre for the number of acres defendants Mills cannot convey, from the 43.46 acres said defendants agreed to deed. Plaintiffs further seek a reduction in the purchase price or a judgment against defendants Mills for the excess payments of taxes over the true amount thereof paid by plaintiffs to defendants

Mills and for damages in the cutting of timber from the said property which was the proximate cause of defendant Mills' conduct.

Plaintiffs further seek relief against defendants Mills by plaintiffs being adjudged the owners in fee of said land, free of all encumbrances, for immediate possession thereof, including all emoluments and appurtenances thereto.

Plaintiffs seek relief against all defendants or those acting under them by enjoining all from trespass, or claiming any interest in the property, for quieting title and for plaintiffs' costs as allowed by statute.

Certain defendants cut or removed timber from the realty without plaintiffs' knowledge or consent and without legal title to the timber or logs and plaintiffs demand judgment against those defendants for their damages to the land and for the value of the timber and ask the Court to double or treble those damages against those who wilfully injured or severed or carried off the trees or logs without lawful authority, upon an accounting by them of the timber so destroyed.

Defendant George Hodgdon, appearing for himself alone, denied that the plaintiffs during 1952, when he was interested with others in logging the timber on the said realty, had any right, title, interest or equity in or to said lands or any part thereof. All other defendants denied the allegations of the complaint not noted as hereinafter admitted, and

pleaded for an order dismissing the complaint for lack of jurisdiction over the subject matter, because it failed to state a claim upon which relief could be granted because necessary parties to the suit were lacking, namely, R. F. Hogan and Sally Hogan, husband and wife, and because defendants were improperly joined.

III. Stipulations:

By agreement of counsel for respective parties hereto, it is ordered that the subsequent course of this action shall be governed by the following Stipulation of Facts:

On Specific Performance

(1) Each of the plaintiffs is now and was at the time of beginning this action a citizen of and resident in the State of Washington.

(2) Each of the defendants is now and was at the beginning this action a citizen of and resident in the State of Oregon.

(3) Michael R. Plastino and Ruth C. Plastino and R. F. Hogan and Sally Hogan, Estber Mills, commonly called "Joe" Mills, and Edna Mills, Ray Douglas and Pauline Douglas, Sigmund Wendling and Dorothy Wendling, are, respectively, husbands and wives; that Sally Hogan is the daughter of plaintiffs.

(4) R. F. Hogan and Sally Hogan have since December 19, 1945, been citizens of and residents in the State of Washington.

(5) Estber Mills is and at all times since Sept. 7, 1945, has been the owner in fee simple of the real estate located in Tillamook County, Oregon, and described in Paragraph I of this Order. Said property is unimproved, wild land covered with brush and trees which were growing.

(6) On November 7, 1945, defendants Mills, for valuable consideration made, executed and delivered to R. F. Hogan and Sally Hogan a written instrument, marked "Exhibit 1," which incorporated the terms and provisions for the original sale by Mills and purchase by Hogan of the real property described, with the exception that the assignment of R. F. Hogan and Sally Hogan to Michael R. Plastino and Ruth Plastino dated January 25, 1946, and the acknowledgment made before a notary public by Estber Mills and Edna Mills on August 27, 1949, were subsequently endorsed upon said Exhibit 1 upon their respective dates and that Exhibit 1 was on August 29, 1949, recorded by the Plastinos in Book 119, at page 359-360 of Record of Deeds of Tillamook County, Oregon. Defendants Mills received the \$100.00 consideration mentioned in Exhibit 1 and knew that Exhibit 1 was recorded.

(7) On January 25, 1946, and again on April 11, 1950, R. F. Hogan and Sally Hogan, for valuable consideration, in writing transferred all their interest in the contract and to the real estate described in Exhibit 1 to plaintiffs Plastino; the assignment of April 11, 1950 was acknowledged before a notary public and recorded April 14, 1950, in Book 122, at

page 327, Record of Deeds of Tillamook County, Oregon.

(8) On January 30, 1951, Mills alone wrote a letter (Exhibit 18) to Michael R. Plastino alone stating the contract (Exhibit 1) was "cancelled" on January 1, 1951, for failure to keep up his payments and pay taxes.

(9) Defendants Mills never made any written demand for payment of installments on said contract.

(10) Taxes on said realty were paid by defendant Mills and the amount charged to the plaintiffs and added to the balance due on the purchase price of said realty, due from the plaintiffs to defendants Mills.

(11) On December 18, 1953, the plaintiffs deposited in the above-entitled court and cause and tendered to defendants Mills the sum of \$925.90.

(12) At no time after Wendling took his receipt on December 7, 1951, did he ever procure a deed or bill of sale, but just the receipt for money.

On Damages:

(15) Sigmund J. Wendling became acquainted with Lot 8 about 1951 as someone informed him there was timber on it and he was interested in logging it, and he got the arrangements through Ray Douglas because he knew Mills. Wendling looked the timber over and was willing to pay \$1,500. He asked Douglas to go over and get the

timber from Mills which he did. Wendling paid Ray Douglas \$1,500 and Douglas paid Mills \$1,500 and Wendling paid Douglas nothing. Ray Douglas procured from Estber Mills and Edna Mills, his wife, a receipt for \$1,500.00 (Ex. 26), reciting that defendants Mills sold to Ray Douglas timber on said Lot 8, and on December 8, 1951, Sigmund Wendling gave a receipt for \$1,500.00 for the timber sold on said Lot 8 to Ray Douglas, all disclosed on the single sheet marked Exhibit 26. This was the only instrument Wendling ever got from defendants Mills and Douglas. He never made a survey, just followed blazes which he didn't know by whom were made. Wendling relied on the receipt for his right to cut the timber on Lot 8, or to transfer the timber to anyone. Wendling heard about the Hogan contract and the Plastino's interest in Lot 8 three or four months before January, 1954, from the Plastinos themselves.

(16) On Jan. 1, 1952, under a logging contract between Publishers' Paper Co. and Sigmund J. Wendling, Wendling negotiated to sell approximately 400 M board feet of additional spruce and hemlock, as shown by Ex. 27, Paragraph 21 of which related to timber on Lot 8. On March 4, 1952, Wendling tendered to Publishers' Paper Co. the two receipts (Ex. 26) and a timber deed (Ex. 28), a copy of which Wendling has in his file, to all of the timber standing or fallen on said Lot 8, covenanting that he was the lawful owner of said property,

which was signed and acknowledged and delivered to Publishers' Paper Co. to induce them to buy the timber on Lot 8. The Publishers' Paper Co. rejected said deed and receipts and requested a title research and proper instruments of conveyance in a letter dated March 13, 1952 (Ex. 29) which was a letter from the firm of Koerner, Young, McCulloch & Dezen-dorf directed to Mr. S. J. Mammano, an employee of the Publishers' Paper Co., and by S. J. Mammano delivered to Sigmund Wendling, advising that Wendling was not in position to convey good title and asking for a preliminary title report, deed from Mills et ux to Publishers' Paper Co., quitclaim deed from Douglas et ux, quitclaim deed from Wendling et ux.

(17) On May 5, 1952, defendant Sigmund Wendling made and entered into an agreement with Publishers' Paper Co. whereby Wendling agreed to supply approximately 400,000 feet of spruce and hemlock and Wendling covenanted to save the Publishers' Paper Co. harmless from all charges, liens and encumbrances, and the logs were to be delivered by January 1, 1953, at the rate of \$31.00 per thousand for grades 2 and 3 and other grades at the current market prices (Ex. 30). Wendling still got no title report nor made any investigation of the record, or knew of the Hogan or Plastino contract.

(18) On the day of June, 1952, Sigmund J. Wendling made a contract with C. K. Warren (Ex. 31) in which Wendling recited that he was the

owner of the timber on said Lot 8 and would sell Warren all standing and down merchantable timber for the sum of \$1,500, which contract of logging was to be completed before the rainy season and all logs removed were to be sold to Publishers' Paper Co. All Wendling wanted was his money out of the contract which he got from Publishers' Paper Co. by means of Exhibit 32, dated September 10, 1952.

(19) On July, 1952, C. K. Warren made a partnership agreement with George Hodgdon (Ex. 33) to log approximately 40 acres on Lot 8, which was under contract between Sigmund Wendling and C. K. Warren, whereby Hodgdon was to furnish the equipment needed and Warren was to pay the \$1,500 stumpage.

(20) On September 10, 1952, C. K. Warren and Sigmund Wendling gave a letter to the Publishers' Paper Co. to hold out \$1,500 which was to be paid Sigmund Wendling for the stumpage on Lot 8. (Ex. 32).

(21) The Wendling-Warren contract of June 1952 (Ex. 31) expired Oct. 5, 1952, and Warren had fallen about 40 M feet or 50 M feet of timber when his time had run out. So Warren went to Mills and got more time. Then Warren and Harveston got together to log Lot 8 and together they secured from defendants Mills their agreement allowing them to log Lot 8, dated Dec. 11, 1952 (Ex. 34). Harveston and Warren wanted until Dec. 10, 1953, but Mills changed a part of that contract (p. 3 of Ex. 34) to provide for notice of extension within ten days of

July 10, 1953. The timber not removed by Dec. 10, 1953, would revert to Mills.

(22) Warren appraised his work and the interest in the 100 M feet left on Lot 8 at \$225.00 and Harveston told Warren he would buy his interest for \$225.00, provided he could get an extension of time from Mills. This extension was granted in Exhibit 34, and thereupon Harveston paid Warren the \$225.00 and secured Warren's assignment of his interest in the contract (Ex. 34) and the timber on Lot 8. The assignment was dated Dec. 12, 1952 (Ex. 35).

IV. Plaintiffs' Contentions of Fact:

Plaintiffs will contend that the following are the facts regarding the issues indicated by the subject in the following paragraphs:

1. After December 7, 1951, the defendants in the particulars herein disclosed went on said Lot 8, cleared ways, built roads, cut timber, removed some logs thereof, left logs and slashings on the lot for which plaintiffs claim damages against all defendants. Based on the above, the amount in controversy involves the following approximate sums of money or value of property involved—

- (a) Specific performance of a contract to convey Lot 8 in the Southeast Quarter of the Southwest Quarter of Section 22, Township 1 North, Range 10 West of the Willamette Meridian, lying East of the state highway in Tillamook County, Oregon, as described in the com-

plaint, is sought and which land was of the value of not less than \$4,000.00 on or about Jan. 30, 1951.

(b) Damages caused to the land for the purposes for which it was purchased, in the approximate sum of \$3,000.00.

(c) Loss of timber on said land in the approximate sum of \$3,500.00 which the Court is asked to double or triple, as the facts may direct, to the sound discretion of the Court, to \$6,000 or \$9,000.

(d) Damages in the sum of \$500.00 as cost to clean the property of slashings, logs and brush left by the loggers to prevent a fire hazard.

2. Value of the property claimed by plaintiffs is corroborated by defendants Mills in the following particulars: Plaintiffs paid to Mills on said property \$800.00. Mills received from Wendling for the timber alone \$1,500, and Mills asked for the land and remaining timber \$1,200 to \$1,500, making a total of from \$3,500 to \$3,800.

3. Defendants Mills knew of the Hogan assignment to Plastinos of Jan. 25, 1946 (Ex. 1) not later than August 27, 1949, or within a year after the contract (Ex. 1) was executed.

(4) On Nov. 29, 1946, defendant Mills wrote he had not followed the contract (Ex. 1) as written, and directed the purchasers, Hogans and Plastinos,

to make the following changes, as evidenced in writing and substantially as follows:

“Received your letter regarding interest on your contract. I have not followed the contract as it was written. I have charged you with interest as you made your payments and applied the balance to the principal. In doing it this way you will save a few dollars. I have outlined to you just how it has been done, so if you will take your contract and apply these payments as I have you will find the interest is less, but you will owe more on the principal than you thought you owed. The \$25.00 a month is all right with me. Or if you want to pay more that will be alright with me also but if I were you I would pay the \$25.00 and I will take the interest out as you go along.

“I had to pay the taxes which I added to the Bal. You will notice on your tax receipt that there was 1 acre taken off. This small piece of land lies west of the highway which was in this parcel of land. I kept this out for some of the fishermen have a small house on it.” (Ex. 2).

(5) On Aug. 5, 1948, the plaintiffs asked defendants Mills for permission to skip their August payment and on August 16, 1948, defendants Mills granted permission and gave greater leniency, as evidenced in writing and substantially as follows:

“It is quite alright to skip your payments for August and any other time when you are short.” (Ex. 6).

(6) By Mills' authority contained in Exhibits 2 and 6, the provision of Exhibit 1 as to time of payment and strict performances of said contract were waived.

(7) The directions of defendants Mills, as contained in Exhibits 2 and 6, were knowingly consented to and mutually followed by all parties to Exhibit 1 and performed from not later than Nov. 29, 1946, up to Jan. 30, 1951, without objection. The Exhibit 1, as so modified, should be called "said contract" to distinguish it from Exhibit 1 as originally written. Defendants Mills never made any changes in the directions given in Exhibits 2 and 6 until his letter (Ex. 18).

(8) Defendants Mills never made any written objections to late or delayed payments on said contract

(9) During the period the Hogans paid on "said contract" in the year 1946, three installments, to wit, April, October and November, 1946, were skipped by purchasers; during the period the Plastinos paid on "said contract"; there were no failures to make monthly installment payments in 1947; there were three payments skipped in 1948 during the months of August, November and December; there were two payments skipped in 1949 during the months of March and August; there were six payments skipped from July to December, inclusive, in 1950. When a payment was skipped, interest was added to the balance. A rejection by defendants Mills of the

plaintiffs' offer to pay the next monthly installment payment in January of 1951, terminated payments.

(10) At no time did defendants Mills, from and after November 7, 1945 (Ex. 1) and the dates of the modifications of "said contract," orally notify plaintiffs, or their predecessors in interest, that they were not performing the terms and conditions of "said contract," or were in default thereon, or give any notice of any change in terms from those agreed upon in and by "said contract," nor specify any time within which the plaintiffs were to perform the terms or provisions, nor make any demands for installments or for full or final payment of the purchase price, or tender any deed or demand any part or full performance of "said contract" by the plaintiffs or either of them; defendants Mills did not give plaintiffs any warning of a proposed cancellation or specify any time for performance or attempt to restore the terms of the original contract (Ex. 1); nor have defendants Mills foreclosed or attempted to foreclose the same in any court having jurisdiction of said property in the manner provided in said contract, or at all.

(11) That Mills' letter of January 30, 1951 (Ex. 18) was the first notification of any change in the attitude of defendants Mills in connection with the performance of "said contract" and the first attempt to cancel the contractual relations between the parties thereto and as of a prior date; that plaintiffs had no notification of cancellation as of January 1, 1951.

(12) Plaintiffs' letter of February 4, 1951, (Ex. 19) to defendants Mills enclosing a check for the \$25.00 monthly installment was mailed prior to the receipt by plaintiffs of any notice of cancellation of "said contract" by defendants Mills and payment was made in conformity with the requirements of "said contract."

(13) That it was plaintiffs' promises of renewal of monthly installments of \$25.00 made January 25, 1951 (Ex. 17) which caused defendants Mills to write their letter of proposed cancellation on January 30, 1951 (Ex. 18) and predating said alleged cancellation to January 1, 1951 (Ex. 18) in order to anticipate any monthly installment payment by plaintiffs, as promised in their letter of January 25, 1951.

(14) Defendants Mills approved and ratified plaintiffs' skipping monthly payments when they were short of money, adding interest on the unpaid balance and taxes when due and paid by defendants Mills to the total balance due on "said contract." (Ex. 13-A, 13-B, 14).

(15) Defendants Mills never extended their abstract of title to Lot 8 after their purchase thereof, procured a title report, had the lot surveyed or did anything to terminate plaintiffs' interest except his letter of Jan. 30, 1951 (Ex. 18); never told the defendants about the Mills-Hogan-Plastino contract.

(16) Defendants Mills received but made no objection to excuses of non-payment of monthly install-

ments made Sept. 13, 1950 (Ex. 16) or January 25, 1951 (Ex. 17).

(17) Taxes were paid by defendants Mills on Lot 8 and by said defendants charged to plaintiffs, but when so charged to or paid by plaintiffs, said taxes so paid to Mills were on property owned by Mills but not sold to plaintiffs, such as lands west of the property in Lot 8, tidelands in front of Lot 8, and defendants Mills acknowledged the error, promised to correct the charges and never effected a segregation for tax purposes of the lands sold to plaintiffs from his lands and did nothing about correcting the over-charges contained in the balances he demanded be paid by plaintiffs. Defendants Mills never sent any statements to plaintiffs for taxes to be paid. (Ex. 9, 10, 13, 13-A, 14, 15).

(18) Eliminated from Lot 8, as sold to the plaintiffs, were the highway right of way of 2.7 acres, land between the railroad right of way and State Highway, west of highway and tidelands in front of Lot 8 and the railroad right of way of $\frac{1}{4}$ acre, leaving in Lot 8 purchased by plaintiffs acres.

(19) Defendants Mills never advised the plaintiffs he had sold the timber on said Lot 8 or was endeavoring to sell the land, but plaintiffs on a visit to said Lot 8 discovered the same for themselves, and defendants Mills have rendered themselves incapable of conveying said premises as agreed in "said contract."

(20) Eliminating defendants Mills, none of the defendants ever at any time secured any title or procured any conveyance to said Lot 8 or the timber thereon, or secured any title report, or made any search of the records of title to Lot 8 personally or through another, or made any inquiry of defendants Mills as to their title, and defendants Mills never told any defendants of the Mills-Hogan-Plastino contract.

(21) Plaintiffs tendered sums on "said contract" in the following amounts at the following times: \$25.00 check on Feb. 5, 1951 (Ex. 20-A); plaintiffs' offer to pay balance due on contract in August, 1953; \$675.00 certified check offered defendants Mills Aug. 26, 1953 (Ex. 21); tender into court of \$925.90 (Comp. 11) on Dec. 18, 1953, to cover all sums due.

(22) Wendling (see Par. 15-18, *supra*) was a gypo logger who supplied labor, equipment and supplies for logging operations. His business was felling timber, bucking and transporting logs and he endeavored to buy the timber on Lot 8, but after the Publishers' Paper Company's attorneys delivered to him a letter advising he did not have good title to said timber (Ex. 18), he never logged any of said timber himself. He claimed not to have known why the Publishers turned him down. He did not know of state regulations. When he contracted, he did not contemplate selling the timber. He never told about the letter he had from the law firm about an insufficient title. (Ex. 29).

(23) Those defendants who had to do with damaging the timber on Lot 8 are as follows:

(a) Those who cut timber: C. K. Warren made a sales agreement in June, 1952, with Wendling (Ex. 31) wherein Warren agreed to buy and Wendling to sell all the standing and down timber on Lot 8 for the sum of \$1,500 payable from logs delivered to the Publishers' Paper Co. at \$10.00 per thousand board feet until \$1,500 was paid, the contract to be completed Oct. 5, 1952. Warren went in with Simmons and they felled and bucked timber for about ten days and Simmons was the first fellow to cut timber. Later Warren went in with George Hodgdon (Ex. 33). Then, after getting the contract from Mills (Ex. 34), Warren went in with Harveston (Ex. 35). When Harveston came in, Warren had about 40 M feet felled and Warren sold his interest to Harveston for \$225.00. While he and Simmons had felled and bucked about 100 M feet, Warren, with his associates, cut a total of between 165 M and 175 M feet, most of which they sold to Publishers and about 10 M of which they sold to Oregon Pulp. He felled and left on the ground about 40 M feet and he left standing from 20 M to 50 M feet. Warren started in July and ended on Sept. 15, 1952, when Publishers' Paper Co. took no more logs. Warren sold to Harveston Dec. 12, 1952 (Ex. 35). Warren paid outside help of three men, besides themselves, \$1,693.32. The logs were branded "JJ." The best timber was along the highway which they did not take because they thought they would take

the hardest part of it first, but the timber left was too little except one man go in with a small "cat" and helper, and the price of logs was up. One could not use a yarder. It would cost too much and there was not enough timber left. Wendling never told Warren he had a letter (Ex. 29) which stated that Wendling did not have good title, but he showed Warren his receipts (Ex. 26) and after Warren sold his interest to Harveston on Dec. 12, 1952 (Ex. 35), Warren never went near Lot 8. Warren had no record of timber because he left all of that to Hodgdon who had a bookkeeper and kept the records.

George Hodgdon went into the timber deal when it was being carried on by Warren and Simmons. Simmons thought he had about \$400.00 in his work in cutting the timber and was willing to sell for that, so Hodgdon paid him \$400.00 in cash and took over Simmons' interest. Hodgdon and Warren entered into a partnership agreement dated July, 1952 (Ex. 33) which was the only agreement Hodgdon and Warren had. Warren had previously tried to find someone with equipment to put in there and Hodgdon had good equipment and Warren was to furnish the timber and buy the stumpage of \$1.500 (Ex. 33) and Hodgdon was to furnish the equipment and together they would log Lot 8. They were to complete the work with diligence and share the profits and losses equally. Hodgdon quit because they had no place to sell logs and he had other timber to log and wanted to get his yarder off of Lot 8.

In place of Warren buying the stumpage of \$1,500, Warren and Wendling gave to Publishers' an order to pay to Wendling \$1,500 on Sept. 10, 1952 (Ex. 32) which Publishers' Paper Company did, and thereby Hodgdon paid one-half of the stumpage that Warren should have paid. Hodgdon logged the timber and delivered it to the Publishers and the Publishers gave statements which are correct so far as he knew. He hauled part of the logs to Publishers at Manhattan Beach with his equipment and does not know where there were deliveries of logs except at Manhattan and Ken Hodgdon's mill. It cost \$4.00 per thousand for hauling to Manhattan. Hodgdon had a crew of four or five men at a time which included a choker-setter, loader, engineer, "cat" man and truck man. He never did anything with the slashings, and all logs taken in were branded "JJ" which was his brand. He hired two men to haul logs, Wade Kerby and another, to Manhattan Beach. He closed the deal with Warren by paying each other what there was to pay, spent the money and quit. When he went away, there was somewhere in the neighborhood of 100 M feet which they had cut and which lay on the ground.

Lyle Simmons worked with the timber on Lot 8 with Warren for about ten days and was the first fellow to cut timber for Warren. He felled and bucked about 100,000 feet, but they kept no records nor sealed any logs and they delivered these to the Publishers. Simmons told Warren in substance that Warren better go down and get a contract with

Wendling before they (Simmons and Warren) went any further because they had gotten in far enough. Simmons also said, "Wendling could come in here after we get 100,000 feet felled and bucked and tell us to get out of here." Warren told him Wendling would draw up a contract which he later did. Simmons got out because he did not like the looks of things and did not like Wendling. Then there was no written contract between Warren and Simmons. Simmons sold to Hodgdon his interest for \$400.00.

(b) The people who also confederated in doing damage to the property were:

Loran D. ("Red") Harveston went onto Lot 8 sometime in the summer or fall of 1953, the driest part of the year, under his written contract with defendants Mills (Ex. 34). Warren had some logs in there he had felled and bucked. Harveston did not help Warren take any timber off the property, but two weeks before Harveston's contract ran out he and McCloskey went in with a power saw and sawed and limbed some trees that were on the ground, cut up something like a dozen logs, probably 8 or 10,000 feet. He paid Warren \$225.00 for his interest on December 12, 1952, and took an assignment (Ex. 35). Harveston promised to buy Warren's interest if Warren got an extension of time from Mills which Warren did. Harveston saw defendants Mills who had told him they would write the people in Seattle, who had just bought the land and see if the Seattle people would give more time,

and if they would, then Harveston could pay Mills \$225.00 and go ahead and log it. Harveston wondered why he should pay Warren \$225.00 and another \$225.00 to Mills. Mills said he would send a wire and later said he had gotten back an answer, so Harveston went down to Mr. and Mrs. Mills and Mrs. Mills said, "I have just finished copying a message from them people in Seattle and they say that it is all right to sell the timber that was bucked and felled and still on the property for \$250."

Mills said they had just talked to the Seattle people, and this is more fully repeated in Harveston's deposition from page 22 to page 25.

Harveston never felled a stick of timber and just cut the logs and chopped the limbs.

Oscar Tittle went on Lot 8 in July, 1952, and did the road work for about three days and charged \$12.50 per day and Warren paid him \$315.00. Tittle used a D-7 "cat" with dozer and Warren showed him where to go, the course to take and he cut the roads from ten to fourteen feet wide, cut places for turns and made fill-ins, taking about one-half to an acre of clearing for yarding. Tittle built this road before Hodgdon got to logging, so Hodgdon signed the check to pay Tittle for putting in the road on to Lot 8 to log off the timber that had been cut.

(24) None of the defendants ever procured a title research or report, or ran a survey, or made a search of the records themselves, or asked about the

title, or gave any deed to the timber, or started any foreclosure in court on their cohorts.

(25) W. M. Docker's cruise of 343,575 board feet taken from Lot 8 and 102,000 board feet left standing thereon, totaling 445,575 board feet, proves Sigmund Wendling was conservative when he twice contracted to deliver to Publishers' Paper Co. 400,000 board feet on Jan. 1, 1952 (Ex. 27, page) and again May 5, 1952 (Ex. 30).

(26) Said Lot 8 had merchantable and commercial timber growing thereon, and the lot lies on the flat top and slope of a hill, with a stream of water running through a part thereof, and the site is from an elevation commanding a view of the town of Garabaldi, the shore, countryside, bay and ocean and useful, among other things for residential and park purposes.

(27) Defendants Mills never in writing advised the plaintiffs they were in default or that there were deficiencies in payment, or demanded payment in full for said contract or payment of taxes, or demanded performance or insisted on time being of the essence of the contract in writing. Said defendants Mills never tendered a deed, never expressed themselves as willing to perform the contract, did not know why on January 30, 1951, they had attempted to cancel the contract as of January 1, 1951; never offered to give back any money and stated they never intended to do so and never brought foreclosure of the contract in any court.

nor extended the abstract after their purchase and never procured a title report or survey of Lot 8.

(28) On Feb. 1, 1951, there was due on said contract \$775.27.

(29) Defendants Mills have permanently ousted the plaintiffs from said real property.

(30) Dft. Wendling never got a deed, bill of sale or title report.

(31) Defendant Wendling never told Warren, while making his deal with Warren, that he had a letter (Ex. 29) in his file questioning his title, never looked up the record and at the time he executed the timber deed (Ex. 28) did not know what title he was conveying and took no warranty from defendants Mills as to title and told Warren nothing about the title to the timber.

(32) When Warren was selling to Harveston his interest, Harveston told Warren he had nothing to sell.

(33) Harveston was out of timber elsewhere and had big equipment that was idle. Warren had his interest in the Hodgdon-Warren agreement of July, 1952 (Ex. 33) and had felled about 100M feet of timber left on Lot 8.

V. Defendants' Contentions of Fact:

(1) No contract in fact existed between the plaintiffs and Estber Mills and Edna Mills in reference to the sale of Lot 8 described in Paragraph III in the complaint.

(2) Any claim of right or interest arising by assignment of the contract dated November 7, 1945, from R. F. Hogan and Sally Hogan were abandoned by the plaintiffs.

(3) Title to Lot 8 has at all times remained in Estber Mills and Edna Mills, husband and wife.

(4) There has been no modification in fact of the terms of the contract of November 7, 1945 (Exhibit 1 to the complaint) since the date of its execution.

(5) That as of January 30, 1951, the contract of November 7, 1945, was in default.

(6) The defendants Estber Mills and Edna Mills at no time trespassed on the property owned by them, namely Lot 8 as described in Paragraph III of the complaint.

(7) The remaining defendants likewise have, at no time, trespassed on Lot 8 as a matter of fact.

(8) The contract of November 7, 1945, has not, in fact, been breached by the defendants Mills with either the plaintiffs or anyone else.

(9) There was no concealment of any facts or information by the defendants Estber Mills and Edna Mills from the plaintiffs.

(10) With the exception of the defendants Estber Mills and Edna Mills, none of the defendants had notice, either constructive or actual, of any claim of ownership or right, title and interest in any timber on Lot 8.

(11) If any of the defendants cut or removed any timber from Lot 8, they did so in good faith and without notice or knowledge that they might be violating the rights or claim of rights of any person whomsoever.

(12) Since the date of contract, Nov. 7, 1945, all taxes on Lot 8 have been paid by defendant Mills.

(13) Plaintiffs have waived all claims against defendants, except as to defendant Estber Mills.

(14) There was no concerted action or conspiracy on the part of the defendants or any of them with respect to the matters described in the complaint.

VI. Plaintiffs' Issues of Law:

Plaintiffs contend that the following principles of law are applicable to this case and support plaintiffs' contentions:

(1) That this Court has jurisdiction of this cause.

(2) That plaintiffs have never defaulted in the monthly payments due under "said contract."

(3) That the plaintiffs have never breached any of the terms or conditions of "said contract."

(4) That the plaintiffs are entitled to have "said contract" specifically performed by the defendants Mills in accordance with its terms, and this applica-

tion is addressed to the sound and reasonable discretion of the Court.

(5) That plaintiffs are entitled to have their title quieted as to all claims of all the defendants, jointly and severally.

(6) That the plaintiffs are entitled to have an injunction against trespass by the said defendants, jointly and severally.

(7) That plaintiffs are entitled to a good and sufficient deed from the defendants Mills and in the event such is not given, that the decree of this Court stand as such conveyance.

(8) After a decree of specific performance vesting legal title in said plaintiffs, that plaintiffs have as an ancillary remedy, a judgment for damages against the defendants, jointly and severally, for the amount of the reduction in value of said real property and for the amount of damages caused by the cutting of timber.

(9) That as to those defendants who cut or carried away the logs that were manufactured from said timber, the plaintiffs have damages against them on the grounds that they wilfully did such cutting without legal title to said timber or the logs derived therefrom and without authority of the plaintiffs. Otherwise, there would be no remedy in anyone to correct the unlawful asportation by certain defendants.

(10) That the cutting of said timber or the carrying away of the logs therefrom is within the

statute authorizing the doubling or trebling of damages and the Court is asked to exercise its discretion in favor of awarding either double or treble damages as the total evidence dictates.

(11) That judgment against the defendants for actual damages be against all defendants, jointly and severally, because of their confederated action or as tort feorsors.

(12) That plaintiffs have a judgment that defendants Mills have breached their contract and abandoned the same unlawfully.

(13) That the amount of plaintiffs' tender is sufficient and should be reduced by the amount of damages defendants Mills caused plaintiffs, with a judgment against defendants Mills for any excess of damages.

(14) That the amount of damages due from said defendants Mills be augmented by any excess payments in taxes made by plaintiffs to defendants Mills.

(15) That all defendants were trespassers upon plaintiffs' estate.

(16) That all defendants had at least constructive knowledge of plaintiffs' right, title, interest and estate in and to said real property by virtue of the recorded contract and assignments thereof and defendants Mills had actual knowledge and defendant Sigmund Wendling had actual knowledge that he had no title, or a defective title in and to said timber which he subsequently attempted to convey.

(17) That by reason of plaintiffs' recording of their contract (Ex. 1) and of the assignments from the Hogans (Exhibits 1 and 23), the defendants are charged with knowledge of plaintiffs' right, title, interest, claim and estate in and to said real property and the logs manufactured therefrom.

(18) Defendants Mills and defendant Wendling came into court with "unclean hands."

(19) Each contract for cutting timber created an encumbrance on Lot 8.

(20) A legal obligation existed upon defendants Mills to have prevented waste to the estate of plaintiffs, both legal and equitable.

(21) That plaintiffs are entitled to an abatement of the purchase price in accordance with the true acreage sold by defendants Mills.

(22) If defendants Mills had effected a rescission, they should have endeavored to restore the status quo of plaintiffs.

(23) Plaintiffs, at their option, are entitled to specific performance, although the defendants Mills cannot perform in full.

(24) The measure of damages to the land is an amount of money determined to be the difference in the value of the land immediately before and immediately after the wrongful act, and the amount so awarded must compensate plaintiffs fully for losses which are the proximate result of the wrongdoers' conduct.

(25) The measure of damages for the loss of trees injured or destroyed, where the trees have a separable or apportionable value, is the reasonable market value of the trees at the time and place of conversion.

(26) Damages to the property, other than the cutting of trees, may be recovered, and the real market value before and after the cutting is the measure.

(27) Damages are compensatory and plaintiffs are entitled to such amount as would compensate them for putting their property back in substantially its former condition.

(28) The Court, if it finds those who cut or carried off any trees from the lands of another did so wilfully and without lawful authority and judgment be given for the plaintiffs for damages, the Court may treble the amount thereof in its discretion.

(29) If the evidence satisfies the Court the trespass was casual or involuntary and the defendants had probable cause to believe the land on which the trespass was committed was his own, judgment shall be given for double damages.

(30) A vendee who does not own title, nor is in possession, nor has a right of immediate possession until he has paid the purchase price, has a right of action for damage which may be trebled.

(31) "Time is of the essence" is a provision of

the contract and may be waived either expressly or by conduct.

(32) The person to whom a tender is made shall at the time specify any objections, or he must be deemed to have waived them.

(33) There is a disputable presumption that an unlawful act was done with an unlawful intent.

(34) The recording of an instrument entitled to be recorded, as Exhibits 1 and 23, is constructive notice to purchasers and encumbrancers who, subsequent to the recording, acquire or claim to acquire some interest or right in the realty.

(35) Such purchaser is charged with notice, not only of the existence and legal effect of the instrument, but all references therein contained.

(36) The recording of Exhibit 1 and the assignment, Exhibit 23, were authorized by law.

(37) No instrument executed by defendants Mills with or between any of the other defendants conveyed any title to land or timber.

(38) Defendant Hodgdon appeared by two Answers through two different sets of attorneys and the Answers were inconsistent with each other. Being the pleader, the pleading is construed most strongly against the pleader and the only issue raised by Hodgdon is whether plaintiffs had any equity in Lot 8 during 1952 when Hodgdon was interested with others in logging the timber on Lot 8.

(39) Certain defendants, by their Answer, seek to raise the question of the jurisdiction of this Court on the matter of the amount involved. On April 5, 1954, Chief Judge Fee ruled the matter should be raised by motion and directed the filing of such motion.

VII. Defendants' Issues of Law:

(1) The Court lacks jurisdiction of the subject matter of the cause of suit or action.

(2) The complaint does not state a claim against any defendant upon which relief can be granted.

(3) The complaint should be denied because necessary parties to the suit are lacking, namely, R. F. Hogan and Sally Hogan, husband and wife.

(4) The complaint should be denied as to the defendants Ray Douglas and Pauline Douglas, Sigmund Wendling and Dorothy Wendling, Loran D. Harveston, Lyle Simmons, George Hodgdon, C. K. Warren and Oscar Tittle, as they have been improperly joined in tort in an action based on contract.

(5) No contractual relation existed at any time between the plaintiffs and Estber Mills and Edna Mills. Consequently, the said defendants cannot be held liable for damages, nor can they be required to specifically perform their agreement by anyone not a party thereto.

(6) The defendants Estber Mills and Edna Mills

were entirely in their rights in selling off the timber from Lot 8.

(7) Defendants Estber Mills and Edna Mills were both legal and beneficial owners of Lot 8 and the timber thereon at the time of the cutting or removal of timber from Lot 8.

(8) The contract of November 7, 1945, was in default as of January 30, 1951, on which date the plaintiffs were so notified in writing. As of the date of January 30, 1951, the contract of November 7, 1945, was abandoned by both R. J. Hogan and Sally Hogan and the plaintiffs.

(9) The plaintiffs have not been damaged in any amount whatever by any cutting or removal of timber from Lot 8 by any of the defendants.

(10) The plaintiffs are not entitled to an accounting by any of the defendants.

(11) There was no conspiracy in fact or law among the defendants or any of them with respect to the severance or removal of timber from Lot 8.

(12) Plaintiffs waived any claims which they may have had against all defendants except Estber Mills.

VIII. Exhibits:

The following exhibits, marked as indicated on each item, may be introduced and received at trial without further proof or identification and subject only to the objection of materiality, competency and relevancy, unless a specific objection to any exhibit

is indicated with reference to the same, but no objection can be made that the same are not originals because they are copies, either photostat, typed or written, nor to the certification thereof.

The parties agree that the following depositions have been taken from witnesses duly sworn and may be used by any party to this cause at the trial as by law and the Federal Rules of Civil Procedure provided: that all questions as to notice, form, time and place of the taking and the signing by witnesses are waived and all objections as to the form of the question are waived unless they were objected to at the time of the examination, but all the testimony is subject to objections at the trial of materiality, competency and relevancy.

A. Plaintiffs' Exhibits

Estber Mills' Deposition

Exhibit No. and Description:

1—Photostat copy of contract between defendants Estber Mills et ux and R. F. Hogan et ux, dated Nov. 7, 1945. [12*]

2—Letter dated Nov. 29, 1946, from defendant Mills to Hogans stating "I have not followed the contract as it was written." [19]

3—Letter dated Sept. 7, 1947, from plaintiffs to defendant Mills enclosing money order and appreciation for showing property. [20]

[*Original page nos. Estber Mills' Deposition.]

4—Letter, June 28, 1948, plaintiffs to Mills—will mail money order on 9th. Hope this all right. [22]

5—Letter, Aug. 5, 1948, Plastino to Mills, asking release from August payment. [23]

6—Letter, Aug. 16, 1948, Mills to Plastino—“It is quite all right to skip your payments for August and any other time you are short.” [23]

7—1946-'47 tax statement, \$34.36—paid Oct. 30, 1946. [26]

8—Tax statement for 1947-'48, \$40.23, paid Oct. 24, 1947. [26]

9—Tax statement for 1948-'49, \$55.35, paid Nov. 4, 1948. [26]

10—Tax statement for 1949-'50, \$124.77, paid Oct. 24, 1949. [27]

11—Letter dated April 6, 1949, defendants Mills to Plaintiffs. “Your balance is now \$928.13.” Discusses logging of the land. [27]

12—Letter, Feb. 2, 1950, plaintiffs to defendants Mills enclosing a list of payments made from plaintiffs' records, requesting check on them. [29]

13—Letter, March 7, 1950, defendants Mills to plaintiffs—1c mistake, 45 installments made, your taxes are \$124.77. You owe \$874.07. [31]

13-A—Three pages of accounting figures. [31]

13-B—Envelope postmarked March 7, 1950, addressed to M. R. Plastino. [31]

14—April 19, 1950 letter, Plastino to Mills, questioning the statement on amount of taxes due; suggest segregation. [35]

15—Letter, April 27, 1950, Mills to plaintiffs, regarding investigation at court house. Correction in tax statement. "I will take the blame." [41]

16—Letter dated Sept. 13, 1950, plaintiffs to defendant Mills. Been out of work, begin payments in near future. [43]

17—Letter, Jan. 25, 1951, Plastino to Mills—just got back to work, long illness, tough luck, appreciate your help. [45]

18—Letter, Jan. 30, 1951, E. Mills to Mr. Plastino—"Your contract was cancelled Jan. 1, 1951, for failing to keep up your payments and taxes." [45]

19—Letter, Feb. 4, 1951, plaintiffs to Mills: I am enclosing check. Believe we will be able to continue payments and pick up back payments later. [54]

20—Envelope marked Feb. 7, 1951, addressed to M. R. Plastino. [54]

20-A—Check No. 843, Plastino to Mills on the National Bank of Commerce, Central Branch, for \$25.00. [54]

21—Letter dated Aug. 26, 1953, to Mr. and Mrs. Joe Mills from attorney for plaintiffs, John W. Hathaway, tendering certified check for \$675.00 drawn on the Central Branch, National Bank of Commerce, enclosing a form of deed. [61]

21-A—Receipt for registered articles, No. 1416, signed by Mills. [61]

21-B—Return Receipt Card No. 1416. [61]

22—Letter dated Aug. 31, 1953, to Attorney John W. Hathaway from Attorney Geo. P. Winslow returning check for \$675.00 and rejecting offer. [61]

23—Assignment dated April 11, 1950, from R. F. Hogan and Sally Hogan to Ruth C. Plastino and Michael R. Plastino for \$500.00 consideration, of contract (Exhibit 1). [12]

24—Receipt for \$100.00 and cancelled checks and American Express money order stubs from Nov. 5, 1945, to June 28, 1950, payments on contract.

25—Summary of payments disclosed by cancelled checks and money order stubs and also showing omissions of payment, made by C. S. Courtenage under direction of plaintiffs, disclosing balance due of \$775.27.

Sigmund J. Wendling Deposition

Exhibit No. and Description:

26—"Receipt" on a single page, dated Dec. 7, 1951, from Mills et ux to Ray Douglas for timber on Lot 8, acknowledging receipt of \$1,500 "paid in full," and below, on the same sheet but dated Dec. 8, 1951, is a receipt from Ray Douglas to Sig Wendling for \$1,500 for timber on Lot 8. [36*]

[*Original page nos. Sigmund J. Wendling Deposition.]

27—Logging contract dated Jan. 1, 1952, between Publishers' Paper Company and Sigmund J. Wendling for 400M. board feet to be supplied from Lot 8 if there. [44]

28—Proposed timber deed dated March 4, 1952, from Wendling to Publishers covenanting he is lawful owner of timber and free from encumbrances. [46]

29—Letter dated March 13, 1952, from Koerner, Young, McColloch & Dezendorf, attorneys for Publishers' Paper Co., turning down the title and prescribing the requirements for clearing title before they would receive logs. [55-57]

30—Agreement dated May 5, 1952, between Publishers' Paper Co. and Wendling concerning Jan. 1, 1952 agreement and agreeing to supply 400M. feet of spruce and hemlock on or before Jan. 1, 1953, at prices mentioned. [57]

31—Contract dated June . . , 1952, between Wendling and Warren, selling timber on Lot 8 for the amount of \$10.00 per M board feet up to \$1,500 to be assigned to Publishers' Paper Co., to be completed before Oct. 5, 1952. [60]

32—Letter of instruction dated Sept. 10, 1952, from Warren and Wendling to Publishers' Paper Co. for paying \$1,500. [62]

33—Agreement dated July . . , 1952, between Hodgdon and Warren for partnership in logging Lot 8. [101]

34—Agreement dated Dec. 11, 1952, from defendants Mills to Warren and Harveston for logging Lot 8. [103]

35—Assignment dated Dec. 12, 1952, from Warren to Harveston of all interest in logging contract, Exhibit 34. [105]

36—State Highway Commission map of Lot 8 and Stipulation by all parties for use in survey of Lot 8.

37—Marshal's map of Lot 8.

38—Stump Cruise of Lot 8, hemlock and spruce, by W. M. Dockery—321,750 board feet.

38-A—Dockery's Cruise of standing timber, spruce and hemlock, 102,000 board feet.

39—4-page accounting by Publishers' Paper Co. of logs received from Hodgdon and Warren from Aug. 14, 1952, to Sept. 30, 1952, totaling 212,720 feet sold for \$7,145.89.

40—Accounting of the Columbia Paper Mills.

41—Pictures relating to Lot 8, taken by Plastinos Sept. 3, 1953—(1) new logging road looking on to Lot 8 across Highway 101; (2) as above; (3) looking west toward Highway 101 from new cat road; (4) slashings on Lot 8; (5) logs and slashings on Lot 8; (6) new cat road and slashings on Lot 8; (6) new cat road and slashings on Lot 8; (7) logs and slashings on Lot 8; (8) new logging road, stumps and slashings on Lot 8; (9) spar tree, stumps and slashings and logging road on Lot 8; (10) spar

tree from different angle, stumps, slashings and logging road on Lot 8; (11) another view of spar tree, stumps and logging road, logs and slashings on Lot 8; (12) slashings on Lot 8; (13) stumps and slashings on Lot 8; (14) logs and slashings on Lot 8; (15) spar tree and slashings on Lot 8; (16) slashings, stumps and logging road, Lot 8; (17) slashings, Lot 8; (18) stumps and slashings, Lot 8; (19) stumps and slashings, Lot 8; (20) stumps and slashings, Lot 8; (21) stumps, slashings and logging road, Lot 8.

42—Certified copy of tax statement involving Lot 8, for 1945-'46, \$137.93.

43—Certified copy of tax statement, Lot 8, for 1946-'47, \$93.14.

43-A—Certified copy of tax statement for 1946-'47, on the south 60 feet of Thayer's Addition.

43-B—Certified copy of tax statement for 1946-'47, on one acre of Lot 8.

44—Certified copy of tax statement for 1947-'48, Lot 8, \$87.30.

45—Certified copy of tax statement for 1948-'49, Lot 8, \$115.49.

46—Certified copy of tax statement for 1949-'50, Lot 8, \$124.77.

46-A—Certified copy of tax statement for 1949-'50, one acre of Lot 8 and the south 60 feet of Thayer's Addition.

47—Certified copy of tax statement for 1950-'51, Lot 8, \$63.41.

48—1951 Oregon Forest Laws.

49—Oregon Forest Laws of 1953, supplementing the 1951 Laws.

50—Deposition of Sigmund J. Wendling, 64 pages, taken Jan. 29, 1954, before Gordon R. Griffith, Notary Public and Court Reporter.

51—Deposition of C. K. Warren, 40 pages, taken Jan. 29, 1954, before Gordon R. Griffith.

52—Deposition of Loran D. Harveston, 34 pages, taken Feb. 17, 1954, before Jack Ellis, Notary Public and Court Reporter, (to be signed by Harveston).

53—Deposition of George Hodgdon, 25 pages, taken Feb. 19, 1954, before Jack Ellis.

54—Deposition of Estber Mills, 65 pages, taken March 3, 1954, before Mary Wakefield, Notary Public and Court Reporter.

55—Figures in pen and ink, written by Mills, in his accounting of a balance due on the contract in the sum of \$830.82.

56—Pencil accounting by Mills of payments on the contract.

B. Defendants Exhibits

100—Defendants' unexecuted copy of the contract of Nov. 7, 1945, showing a balance of \$717.05 due "6/31/50."

101-A—Envelope postmarked Sept. 13, 1950.

101-B—Letter from Plastinos to Mills. (See Plfs'. Ex. 16.)

102-A—Envelope.

102-B—Letter from Plastinos to Mills, dated Jan. 4, 1951.

103-A—Return postal receipt, dated 2/3/50.

103-B—Letter, dated Jan. 30, 1951. (See Plfs'. Ex. 18.)

104-A—Envelope, postmarked Feb. 3, 1947.

104-B—Letter, dated Jan. 31, 1947, from Hogans to Mills.

105-A—Envelope, postmarked Aug. 26, 1953.

105-B—Letter, Hathaway to Mills tendering \$675.00. (See Plfs'. Ex. 21.)

106—Winslow's letter to Hathaway, dated Aug. 31, 1953. (See Plfs'. Ex. 22.)

IX. Trial By Jury:

Is waived by the parties and they stipulate all issues may be tried by the Court.

X. Pleadings:

Since the pre-trial conference has been held and participated in by all parties, it is ordered that the issues of law and fact are fully set forth herein and the pleadings now pass out of the case and this Pre-trial Order shall control the subsequent course of trial and shall not hereafter be amended except by consent of the parties or order of the Court to prevent manifest injustice.

Dated this 20th day of May, 1954, at *May* o'clock
..m.

/s/ GUS J. SOLOMON,
United States District Judge.

/s/ ROBERT R. RANKIN,
Of Attorneys for Plaintiffs.

PHILIPS, HODLER &
SANDEBERG and
WILLIAM C. RALSTON,

By /s/ WM. C. RALSTON,
Attorneys for All Defendants.

/s/ IRVING RAND,
Attorney for Defendant
George Hodgdon.

[Endorsed]: Filed May 20, 1954.

[Title of District Court and Cause.]

OPINION

March 18, 1955

Solomon, Judge:

On November 7, 1945, defendants Estber Mills and Edna Mills, as vendees, and R. F. Hogan and Sally Hogan, as purchasers, entered into a contract for the sale and purchase of a portion of Lot 8, Section 22, Township 1 North of Range 10 West of the Willamette Meridian, containing 43.46 acres more or less, located in Tillamook County, Oregon, for the sum of \$1,575.00. The contract provided for the payment of \$100.00 at the time the contract was executed and the balance to be paid at \$25.00 per month plus interest, beginning December 1, 1945. All taxes thereafter levied against the property were to be paid by the purchasers.

The contract, which was on a commonly used printed form, contained a provision for the prompt payment of installments and strict performance of all conditions of the contract. The contract also contained the following provision:

“The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any

such provision or as a waiver of the provision itself.”

On January 26, 1946, the Hogans assigned all of their rights to the contract to plaintiffs, which assignment was endorsed on the contract of sale above described. Thereafter the Hogans executed a formal assignment transferring all of their interest to the plaintiffs. In neither assignment did the plaintiffs promise or agree to assume the payments or other obligations of the Hogans. All of the \$25.00 monthly payments, with the possible exception of the first one, were made by the plaintiffs.

Shortly after the execution of the contract, it was agreed that the \$25.00 monthly installments were to include both principal and interest.

In 1946, with the consent of Estber Mills, plaintiffs failed to make three of the monthly payments; in 1948, three more payments were missed; in 1949, two payments; in 1950, no payments were made during the last six months.

On January 30, 1951, at a time when no payments had been made for almost seven months, and when there was \$775.27 due on the principal, defendants Mills notified plaintiffs that the contract had been cancelled on January 1, 1951, for failure to make the necessary installment payments or pay the taxes. Within a few days thereafter, plaintiffs tendered a payment of \$25.00 which was rejected on the ground that the contract had previously been terminated.

In December, 1951, Sigmund Wendling, a logger in the area, contacted Ray Douglas, a tavern owner, and told him he was interested in purchasing the timber on Lot 8 so that he could log it. Douglas contacted Mills, and a sale of the timber was arranged. Douglas received no compensation for his services. Wendling then attempted to sell the timber to Publishers' Paper Co., but the deal fell through apparently because the Publishers' Paper Co. received a letter from its attorneys to the effect that from the records made available to them, Mr. Wendling was not in a position to convey good title. These attorneys suggested that a title insurance policy in the sum of \$1,500.00 together with deeds from Mills, Douglas and Wendling and their respective wives be obtained.

Thereafter Wendling entered into an agreement with C. K. Warren by which he agreed to sell all of his interest in the timber on the tract for \$1,500.00, the amount he had paid for it. This contract, dated June, 1952, contemplated that the logs would be sold to Publishers' Paper Co. and that from the logs delivered, Wendling would be paid at the rate of \$10.00 per thousand until the purchase price had been paid.

Thereafter, in July, 1952, Warren entered into an oral partnership agreement with Lyle Simmons to log this lot and, Simmons worked for about 10 days during which time they felled and bucked about 100,000 feet, which was sold to Publishers' Paper Co.

In July, 1952, George Hodgdon paid Simmons \$400.00 for his interest in the partnership and entered into a partnership with Warren. They felled some of the timber on the lot and delivered a portion of the timber that was cut into logs to Publishers' Paper Co. At about this time, Oscar Tittle did some road work on this lot with his tractor for which he was paid \$315.00.

Later, George Hodgdon transferred his interest to Loran D. Harveston, who with C. K. Warren obtained an extension of time within which to remove the timber. While Harveston did limb a few trees and sawed them into logs, he did not remove any timber from the property.

On August 26, 1953, the plaintiffs tendered to defendants Estber Mills and Edna Mills the sum of \$675.00, the entire amount which they claimed was due on the contract.

On December 18, 1953, the plaintiffs filed an action in which they tendered into court the sum of \$925.90, their revised figure as to the amount due under the contract, and commenced an action for specific performance against Estber Mills and Edna Mills. They also demanded damages from not only defendants Mills, but also from Ray Douglas and Pauline Douglas, his wife, Sigmund Wendling and Dorothy Wendling, his wife, Loran D. Harveston, Lyle Simomns, George Hodgdon, C. K. Warren, and Oscar Tittle, claiming that all of the defendants had participated in a confederation or conspiracy against them.

My task has not been simplified by the pleadings in this case. The complaint sets out in great detail evidentiary matters, and these are repeated and elaborated upon in the pre-trial order. Instead of simplifying the issues, they were made more complicated. The voluminous briefs continued the process.

However, in spite of this mass of material, I have carefully considered each contention made in the pleadings, as well as in the briefs.

At the conclusion of the testimony I expressed the opinion that a number of persons who were joined as defendants should not have been made parties because their participation, if any, in the alleged wrong was so minor or so remote. I was told, however, that they were joined on the basis of a "confederation," and I was assured that a confederation is different than a conspiracy. Although I seriously considered dismissing this case for lack of jurisdiction, I came to the conclusion that, absent a showing of bad faith, the allegations in the complaint alleging the proper jurisdictional amount are sufficient to support jurisdiction based upon diversity.

I, therefore, find that this court has jurisdiction over the parties and subject matter of this action.

I have carefully considered the case on its merits, and I have come to the conclusion that the defendants are entitled to judgments in their favor without costs.

In arriving at this conclusion I am well aware of the fact that the conduct of defendant Estber Mills is not commendable. He is a shrewd and cynical person. I am convinced that this property has as little value as he testified it was worth, and I am firmly of the opinion that the land or the timber was never worth the amount for which it was sold by him either to the Hogans or the Wendlings. Neither do I admire him for his action in cancelling the contract of purchase. However, the following excerpt from the case of *City of Reedsport v. Hubbard*, decided September 22, 1954, by the Supreme Court of Oregon, and appearing in Vol. 59, Page 115, Oregon Advance Sheets, at Page 128, sets forth my views concerning the reach of my authority:

“* * * The court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh and unjust. The contracts of parties *sui juris* are solemn undertakings, and in the absence of any recognized ground for denying enforcement, they must be enforced strictly according to their terms. It is not the province of the court to rewrite a contract for the purpose of accomplishing that which, in the court's opinion, might appear proper. ORS 174.010, 174.020; *Fendall v. Miller*, 99 Or 610, 196 P. 381; *Sinnott v. Interstate Contract Co.*, 86 Or 189, 168 P. 81.”

I, therefore, find that under a contract which contains the following provision:

“The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself.”

a vendor who has not received a payment for almost seven months has the privilege of declaring the contract null and void in accordance with other provisions of the contract even though he has on prior occasions waived strict performance of the requirement to make the monthly installments.

I am even more convinced that the failure of the plaintiffs to communicate with the defendant Estber Mills or to tender the amount due for a period of more than two years after their \$25.00 check was returned to them constitutes an abandonment of any title which they might have held at that time.

It is clear that an unperfected equitable title may be lost by abandonment. Although the mere passage of time is not sufficient to constitute abandonment, that fact coupled with the failure to pay taxes and the failure to remonstrate with the defendant Estber Mills after having received a letter notifying them of the cancellation, in my opinion indicates that at

some time during that period the plaintiffs intended to and did abandon their interest in the property.

Defendants may prepare findings of fact and conclusions of law and a judgment in their favor without costs.

[Endorsed]: Filed March 18, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on for trial before the Honorable Gus J. Solomon, Judge of the above-entitled Court, the plaintiffs appearing in person and by their attorney Robert R. Rankin, the defendants Estber Mills and Edna Mills, husband and wife; Ray Douglas and Pauline Douglas, husband and wife; Sigmund Wendling and Dorothy Wendling, husband and wife; Loran D. Harveston; Lyle Simmons; C. K. Warren; and Oscar Tittle appearing in person and by their attorneys George P. Winslow and William C. Ralston, and the defendant George Hodgdon appearing in person and by his attorney Irving Rand, and a pre-trial conference having been had and a pre-trial order having heretofore been entered, and the Court having heard the evidence of the plaintiffs and evidence of the defendants and the cause having been argued and the case submitted, and the Court being fully advised in the premises now makes the following:

Findings of Fact

I.

This Court has jurisdiction over the parties and subject matter of this action.

II.

On November 7, 1945, defendants Estber Mills and Edna Mills, as vendees, and R. F. Hogan and Sally Hogan, as purchasers, entered into a contract for the sale and purchase of a portion of Lot 8, Section 22, Township 1 North of Range 10 West of the Willamette Meridian, containing 43.46 acres more or less, located in Tillamook County, Oregon, for the sum of \$1,575.00. The contract provided for the payment of \$100.00 at the time the contract was executed and the balance to be paid at \$25.00 per month plus interest, beginning December 1, 1945. All taxes thereafter levied against the property were to be paid by the purchasers.

The contract, which was on a commonly used printed form, contained a provision for the prompt payment of installments and strict performance of all conditions of the contract. The contract also contained the following provision:

“The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any

breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

III.

On January 26, 1946, the Hogans assigned all of their rights to the contract to plaintiffs, which assignment was endorsed on the contract of sale above described. Thereafter the Hogans executed a formal assignment transferring all of their interest to the plaintiffs. In neither assignment did the plaintiffs promise or agree to assume the payments or other obligations of the Hogans. All of the \$25.00 monthly payments, with the possible exception of the first one, were made by the plaintiffs.

IV.

Shortly after the execution of the contract, it was agreed that the \$25.00 monthly installments were to include both principal and interest.

In 1946, with the consent of Estber Mills, plaintiffs failed to make three of the monthly payments; in 1948, three more payments were missed; in 1949, two payments; in 1950, no payments were made during the last six months.

On January 30, 1951, at a time when no payments had been made for almost seven months, and when there was \$775.27 due on the principal, defendants Mills notified plaintiffs that the contract had been cancelled on January 1, 1951, for failure to make the necessary installment payments or pay the

taxes. Within a few days thereafter, plaintiffs tendered a payment of \$25.00 which was rejected on the ground that the contract had previously been terminated.

V.

In December, 1951, Sigmund Wendling, a logger in the area, contacted Ray Douglas, a tavern owner, and told him he was interested in purchasing the timber on Lot 8 so that he could log it. Douglas contacted Mills, and a sale of the timber was arranged. Douglas received no compensation for his services. Wendling then attempted to sell the timber to Publishers' Paper Co., but the deal fell through apparently because the Publishers' Paper Co. received a letter from its attorneys to the effect that from the records made available to them, Mr. Wendling was not in a position to convey good title. These attorneys suggested that a title insurance policy in the sum of \$1,500.00 together with deeds from Mills, Douglas and Wendling and their respective wives be obtained.

VI.

Thereafter Wendling entered into an agreement with C. K. Warren by which he agreed to sell all of his interest in the timber on the tract for \$1,500.00, the amount he had paid for it. This contract, dated June, 1952, contemplated that the logs would be sold to Publishers' Paper Co. and that from the logs delivered, Wendling would be paid at the rate of \$10.00 per thousand until the purchase price had been paid.

Thereafter, in July, 1952, Warren entered into an oral partnership agreement with Lyle Simmons to log this lot, and Simmons worked for about 10 days during which time they felled and bucked about 100,000 feet, which was sold to Publishers' Paper Co.

In July, 1952, George Hodgdon paid Simmons \$400.00 for his interest in the partnership and entered into a partnership with Warren. They felled some of the timber on the lot and delivered a portion of the timber that was cut into logs to Publishers' Paper Co. At about this time, Oscar Tittle did some road work on this lot with his tractor for which he was paid \$315.00.

Later, George Hodgdon transferred his interest to Loran D. Harveston, who with C. K. Warren obtained an extension of time within which to remove the timber. While Harveston did limb a few trees and sawed them into logs, he did not remove any timber from the property.

VII.

On August 26, 1953, the plaintiffs tendered to defendants Estber Mills and Edna Mills, the sum of \$675.00, the entire amount which they claimed was due on the contract.

On December 18, 1953, the plaintiffs filed an action in which they tendered into court the sum of \$925.90, their revised figure as to the amount due under the contract, and commenced an action for specific performance against Estber Mills and Edna Mills. They also demanded damages from not only defend-

ants Mills, but also from Ray Douglas and Pauline Douglas, his wife, Sigmund Wendling and Dorothy Wendling, his wife, Loran D. Harveston, Lyle Simmons, George Hodgdon, C. K. Warren, and Oscar Tittle, claiming that all of the defendants had participated in a confederation or conspiracy against them.

VIII.

That at the time of filing their complaint, the plaintiffs deposited in the registry of this Court, the sum of \$925.90 pending the outcome of the trial.

IX.

That subsequent to January 30, 1951, when the plaintiffs were notified that the contract had been cancelled, and prior to the date of the return to them of their check for \$25.00, the plaintiffs abandoned their unperfected equitable title in Lot 8.

Based upon the foregoing Findings of Fact, the Court deduces the following:

Conclusions of Law

I.

Under the contract of November 7, 1945, which contains the following provision:

“The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any

breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself.”

a vendor who has not received a payment for almost seven months has the privilege of declaring the contract null and void in accordance with other provisions of the contract even though he has on prior occasions waived strict performance of the requirement to make the monthly installments.

II.

The failure of the plaintiffs to communicate with the defendant Estber Mills or to tender the amount due for a period of more than two years after their \$25.00 check was returned to them, constitutes an abandonment of any title which they might have held at that time.

III.

All defendants are entitled to judgments in their favor and against the plaintiffs, but without costs.

IV.

The plaintiffs are entitled to the return of the sum of \$925.90 deposited with the registry of this Court.

Made and Entered of record this 1st day of April, 1955.

/s/ GUS J. SOLOMON,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 1, 1955.

In the District Court of the United States
for the District of Oregon
Civil No. 7293

MICHAEL R. PLASTINO and RUTH C. PLAS-
TINO, Husband and Wife,

Plaintiffs,

vs.

ESTBER MILLS and EDNA MILLS, Husband
and Wife; RAY DOUGLAS and PAULINE
DOUGLAS, Husband and Wife; SIGMUND
WENDLING and DOROTHY WENDLING,
Husband and Wife; LORAN D. HARVES-
TON; LYLE SIMMONS; GEORGE HODG-
DON; C. K. WARREN; and OSCAR TITTLE,

Defendants.

JUDGMENT

Based on the Findings of Fact and Conclusions
of Law heretofore made and entered herein,

It Is Considered, Ordered and Adjudged that the
complain of the plaintiffs be, and it is hereby dis-
missed, and

It Is Further Ordered that the clerk of this Court
return to the plaintiffs, the sum of \$925.90 hereto-
fore deposited with him.

Made and Entered of record this 1st day of April,
1955.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 1, 1955.

[Title of District Court and Cause.]

ORDER OVERRULING OBJECTIONS

This matter coming on for hearing upon the objections of the plaintiffs to the Findings of Fact, Conclusions of Law and Judgment, and the Court having heard argument of counsel and being fully advised;

Now, Therefore, denies the objections of the plaintiffs to Findings of Fact, Conclusions of Law and Judgment.

Dated this 25th day of April, 1955.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 25, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, Michael R. Plastino and Ruth C. Plastino, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the entire final judgment entered in the above-entitled action, also from said District Court's order denying plaintiffs' objections to the Findings of Facts, Conclusions of Law and Judgment for defendants, entered herein on April 25, 1955.

/s/ ROBERT R. RANKIN,
Attorney for Plaintiffs-
Appellants.

[Endorsed]: Filed May 23, 1955.

United States District Court
District of Oregon

Civil No. 7293

MICHAEL R. PLASTINO and RUTH C. PLAS-
TINO, Husband and Wife,

Plaintiffs,

vs.

ESTBER MILLS and EDNA MILLS, Husband
and Wife; RAY DOUGLAS and PAULINE
DOUGLAS, Husband and Wife; SIGMUND
WENDLING and DOROTHY WENDLING,
Husband and Wife; LORAN D. HARVES-
TON; LYLE SIMMONS; GEORGE HODG-
DON; C. K. WARREN; and OSCAR TITTLE,

Defendants.

Portland, Ore., Wednesday, May 19, 1954, 9:15 A.M.

Before: Honorable Gus J. Solomon, District Judge.

Appearances:

ROBERT R. RANKIN,
Of Attorneys for Plaintiffs;

WILLIAM C. RALSTON, and
GEORGE P. WINSLOW,

Of Attorneys for All Defendants Except
Defendant George Hodgden;

IRVING RAND,
Attorney for Defendant George Hodgden.

TRANSCRIPT OF PROCEEDINGS

* * *

EARL A. MARSHALL

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin: [2*]

* * *

The Court: Are you not going to offer all of your exhibits? [3]

Mr. Rankin: Yes, all that are listed here I am offering.

The Court: To what exhibits do you object, Mr. Ralston, Mr. Winslow?

Mr. Winslow: I have never seen them, your Honor, as far as the list herein. It was rewritten and given to me this morning, and I would like—I do not know of very many objections, but I would like to reserve the right to examine them during the noon hour.

The Court: Very well, we will do that. Have you seen the Defendants' Exhibits, Mr. Rankin?

Mr. Rankin: Yes.

The Court: Have you any objection to any of them?

Mr. Rankin: No objection with the exception that the contract that he offers is not an executed

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Earl A. Marshall.)

contract, and it is only a duplicate of the contract that we have already in evidence.

The Court: It would not make any difference then if you have an executed contract.

Mr. Rankin: Yes.

The Court: Then we will leave out 100 and start with 101-A. 101-A to 106, inclusive, are admitted.

(Envelope postmarked September 13, 1950, marked Defendants' Exhibit 101-A, received in evidence.) [4]

* * *

Mr. Rankin: Did you estimate the area of this part of Lot 8 which we are calling Lot 8 for convenience? Did you estimate the area?

A. Yes, I calculated the area.

Q. What was the area of that part which was purchased by the Plastinoes east of the highway?

A. I haven't got it here. It is on the map, 38.

Q. 34.74? A. That sounds reasonable.

Q. That is on your map?

A. That is on the map.

The Court: 34.74?

Mr. Rankin: Yes, acres; 34.74 acres. [8]

* * *

W. M. DOCKERY

a witness produced in behalf of plaintiffs, having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rankin: [10]

* * *

Q. (By Mr. Rankin): From your work, did you come to an estimate of the total amount of standing timber on this property at some previous time? A. Some previous time?

Q. Yes, did you come to a conclusion within a short—within a year?

A. You mean what they would be on that land altogether before it was logged?

Q. Right, sir.

A. Well, I have the amount that I figured out that was logged and the amount that is [11] standing.

The Court: Give it to us.

Q. (By Mr. Rankin): What are those amounts?

A. The amount that was logged was 321,750 board feet.

The Court: What is that amount?

The Witness: 321,750 board feet.

Mr. Rankin: 321,750 board feet.

The Court: How much is standing?

The Witness: Standing is 102,000 board feet.

The Court: 102,000.

Q. (By Mr. Rankin): Making a total of what?

(Testimony of W. M. Dockery.)

A. Making a total of 423,750 board feet. [12]

* * *

Q. What amount of that was spruce, first, that was cut and removed?

A. The total was 28 trees, 100,140 feet.

Q. Of what?

A. Of spruce, and there was 221,610 of hemlock.

Q. How about that that was standing?

A. Total number standing was 102,000 feet altogether.

Q. How much hemlock and how much spruce?

A. 27,000 hemlock and 75,000 spruce. [13]

* * *

Redirect Examination

By Mr. Rankin:

Q. What would you say as to the quality of the timber that was taken?

A. The quality of the timber that was taken?

Q. Yes. [16]

A. I would say that it was a pretty good quality.

Q. Did you have evidence of peeler logs?

A. Well, a No. 2 log would make a peeler log, and I know there were lots of No. 2's there. There should have been.

Q. What condition did you find the property in as to logs that were dicarded? Were they left there, not hauled off the property after cutting?

A. Well, the ground is just the same as any logged area would be after it has been logged. The

(Testimony of W. M. Dockery.)

slash is still there and is a fire hazard; never had been cleaned off. [17]

* * *

W. HENRY THOMAS

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Rankin:

Q. Mr. Thomas, did you have any indications of where the lines of Lot 8 were? A. No.

Q. How did you get those indications?

A. Earl Marshall made a survey of lot 8 in question. I did not see him personally in the field, but I had his map, and I identified his lines and went to the points on the four corners of the tract.

Q. Have you seen his map? A. Yes.

Q. Exhibit 37 in this case? A. I have. [20]

Q. Did you have it with you when you made your run on these lines? A. Yes.

Q. Who was with you at the time you made this run of these lines?

A. W. M. Dockery and Michael Plastino.

Q. Did you do anything in connection with checking what Mr. Dockery had done in his estimate of standing and felled and removed timber, the stump cruise?

(Testimony of W. Henry Thomas.)

A. I made a casual check of a few of the stumps with Dockery this way. We would agree on the stump diameter, and he would give me his opinion as to the volume of the, the net volume of merchantable timber in that tree, and I agreed with him.

Q. Did you when you made this joint inquiry as to the stump cruise and standing timber have any disagreement? A. No.

Q. About the quantity?

A. No material disagreement.

Q. You just heard Mr. Dockery's testimony, did you, as to the quantity that he found there?

A. I did.

Q. Assuming from your inspection of the premises with Mr. Dockery and from his testimony that there was 423,750 board feet divided into spruce and hemlock in the quantities that I believe you have heard and understand, do you have any opinion of the fair market value of the merchantable standing [21] timber upon this property as of the month of June, 1952? A. I have.

Q. Will you state what your opinion of that fair market value of that standing timber at that time may be? A. \$3,049.61.

Q. \$3,049.61. Did you find in your inspection of Lot 8, as we are using that expression here, and you understand what is meant by Lot 8?

A. I do.

Q. It is the same as described in Mr. Marshall's map? A. I do.

(Testimony of W. Henry Thomas.)

Q. Did you find any slashings, trash, discarded logs, or anything of that nature left on that property? A. Yes.

Q. From your experience, did that constitute a fire hazard? A. It certainly does.

Q. Have you any idea, Mr. Thomas what it would take in the matter of expenditure to comply with the state law in clearing that Lot 8 of those slashings? [22]

* * *

Q. Will you answer it, please?

A. To put that acreage that had been logged in Lot No. 8 under full compliance with the State Fire Protection Rules, I am of the opinion it would cost from \$350 to \$400 as a lump sum.

Mr. Rankin: Your witness.

Cross-Examination

By Mr. Rand:

Q. Mr. Thomas, was your estimate of the market value that of the standing timber on this Lot 8 in June, 1952?

A. It is—that lump sum, Mr. Rand, includes the timber that was removed and the timber that is left standing.

Q. As of June, 1952? A. As of June, 1952.

Q. The estimate of value was dependent upon the quantity of timber estimated by Mr. Dockery, was it? A. It was.

(Testimony of W. Henry Thomas.)

Q. On the quality of the timber which was estimated by him [23] also?

A. To a certain extent, Mr. Rand, I was able to form my opinion as to the propable quality of the timber.

The Court: Probable what?

The Witness: Quality, your Honor. Most of the timber had been logged, and the only way that you had of measuring the probable quality—and I use that expression advisedly—is by the size of the stump and the length of the tree. It is an estimate and an opinion sure and simple.

The Court: I think first you ought to tell us what the value of the logged timber and what was the value of the standing timber remaining. Do you have that?

The Witness: I could figure it very quickly.

The Court: Let us hear what that is.

The Witness: This will be rounded off to the nearest dollar if you do not mind.

The Court: That is all right.

The Witness: The timber that was removed, the fair market value is \$2,437.

The Court: The balance for the standing——

The Witness: The balance, the fair market value of the timber left is \$612, in my opinion.

The Court: What value did you assign to the spruce and what value to the hemlock?

The Witness: I had to break it down, your Honor, a little further than that. I put the spruce pulp logs and [24] the spruce——

(Testimony of W. Henry Thomas.)

Mr. Winslow: Spruce what?

The Witness: Spruce pulp logs and the hemlock pulp logs in at a unit value of \$6 per thousand.

The Court: \$6 per thousand standing?

The Witness: No, standing and logged.

The Court: I mean before it was logged you came to the conclusion it was worth \$6?

The Witness: That is right. The hemlock saw logs, of which there was only 88,000, in my opinion I appraised at a unit value of \$7.50 a thousand, and the small amount of spruce saw logs, 75,000, at \$11 a thousand.

The Court: Could you tell by looking at the stump and the top what percentage of merchantable timber there was in the portion that was removed?

The Witness: Fairly closely.

The Court: Is it your testimony that you and Mr. Dockery came to the same conclusion as to the amount of stumpage?

The Witness: I agree with his amount of stumpage, yes, sir.

The Court: Is that not very rare for two appraisers who look at the same timber to ever arrive at the same conclusion?

The Witness: You are talking about appraisers. I am talking now about cruising.

The Court: Cruising, that is what I am talking about. [25]

The Witness: That is right. Now, if I may explain this, in checking Dockery's cruise, my only check, as I said previously, was by going to a certain stump. We would agree on the stump diam-

(Testimony of E. W. Ford.)

Q. They would not be feasible for ordinary residential traffic, would they?

A. Well, I think not, in this respect, that I believe that they would be in the wrong location if you wanted to develop that property. [39]

* * *

RUTH C. PLASTINO

a plaintiff, called in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Where do you live, Mrs. Plastino?

A. At 1423 Madrona Drive, Seattle, Washington.

* * *

Q. Did you know about this purchase of this tract at the time it was made on the 7th of November, 1945?

A. Yes, sir.

Q. How did you happen to know about it?

A. My daughter called me from Tillamook by telephone.

Q. Did they explain to you the nature of this property?

A. They did. [47]

* * *

Q. What did you find in connection with the character of this property? Will you describe it?

A. We found on the highway a quarter of a mile, the property included a quarter of a mile on the

(Testimony of Ruth C. Plastino.)

highway that would make very fine entrance for a motel below, and as we hiked up a very short distance through the trees, and the lay of the land was quite level where we figured we could put in some nice residences that would overlook the town and the bay and out into the ocean, and we found streams in there running right from practically the top of the property down to the highway. It had a very lovely possibility of nice residential homesites in correspondence with some very fine homes right across the highway overlooking the same views, as we saw, from this tract of land that we purchased there. [48]

* * *

Q. (By Mr. Rankin): How long did the children carry this contract?

A. They bought it in 1945, in November. They asked us to advance the money for it, which we did, and they made several payments until she took very ill, and we gave them the money for their payments.

Q. How long did you continue and did they continue to make the payments in their name?

A. I would say approximately—they bought it in 1945, and I believe it was towards the beginning of, the last of 1946, or the beginning of 1947, we had made the payments to them, and then they assigned it over to us.

Q. I will hand you this Exhibit 24, and ask you if you can identify what those are?

A. These are checks. That is the receipt for their down payment, and then checks by the daughter

(Testimony of Ruth C. Plastino.)

and son-in-law and [49] then by my husband and some Railway Express receipts by myself of the payments on the property. [50]

* * *

Q. When you omitted to make payments as this record shows, on the month, what was done with respect to interest?

A. We added the interest to the balance of the principal, and on the next payment we deducted from the \$25 the interest of the previous payment and the payment we were making and put the balance of that \$25 and deducted it from the—would you say grand total or full total? [51]

Q. Balance due? A. Balance due.

* * *

The Court: You admit that the contract was varied to that extent so as to permit deduction of the interest each month rather than semi-annually?

Mr. Winslow: It was.

The Court: It is admitted, Mr. Rankin, so you do not have to prove that.

Mr. Rankin: Thank you.

Q. Now, take the letter of August 16, 1948, that same fall. Did you have permission to skip payments? A. Yes, Mr. Rankin.

Mr. Winslow: We object except as the letter so states.

Mr. Rankin: That is the reason I am asking

(Testimony of Ruth C. Plastino.)

about it. That is the reason I put the letter in the pre-trial order rather than try to interpret it myself.

Q. Did you skip payments in accordance with that letter?

Mr. Winslow: That still calls for a con- [52] clusion.

The Court: Yes; objection sustained.

Mr. Rankin: Would the Court look at this letter then?

The Court: If it is in evidence. Offer it. It speaks for itself, and the records of payments speak for themselves. If she skipped payments, it shows on the document that has been admitted, No. 25.

Mrs. Plastino, did you rely on the letter that you have in your hand at the time you missed some payments?

The Witness: Yes, your Honor, we wrote and asked for permission to miss some payments due to illness and unemployment.

The Court: Very well. Proceed.

Q. (By Mr. Rankin): Were you ever told anything any different than what those letters disclosed? A. Never at any time.

Q. There is no claim that he modified this in any writing or made any demand for payment, but there is a claim by Mr. Mills that he orally told you. Did he ever orally tell you that you were not performing your contract?

A. At no time was there ever a mention of anything of that type at all.

(Testimony of Ruth C. Plastino.)

Q. Did he ever make any demand for installments orally or in writing? A. Never.

Q. Did he ever tell you you were in default?

A. Never. [53]

Q. Either orally or in writing? A. Never.

Q. Did he ever give you any notice that he was changing what he had specified in these two letters, Exhibits 2 and 6? A. No, sir, never.

Q. Did he ever specify a time when he—when you were required to perform either in full or in part? A. No, sir, at no time.

Q. Did he ever make any demand for installments? A. Never.

Q. Or for full payment, either one?

A. Neither one, sir.

Q. Did he ever tender any deed?

A. No, sir.

Mr. Winslow: Objected to as wholly immaterial.

Mr. Rankin: It is my understanding that when you are suing for specific performance you must show these things, and I agree to it to that extent, and that is the basis of my inquiry.

The Court: Go ahead.

Q. (By Mr. Rankin): Did he ever foreclose this contract? A. No, sir, never.

Q. Or attempt to foreclose it? A. No, sir.

Q. You received a letter from Mr. Mills about January, dated January 30, 1951; did you not? [54]

A. Yes, sir.

Q. In which he says, "Your contract was canceled?"

(Testimony of Ruth C. Plastino.)

The Court: Show her the letter.

Mr. Rankin: Yes, it is in the Mills' deposition.

(Deposition produced.)

Q. (By Mr. Rankin): I show you what has been marked here as Plaintiffs' Exhibit 18.

The Court: Is that the letter of January 30?

Mr. Rankin: That is right.

The Court: Is there any objection?

Mr. Winslow: No.

The Court: It may be admitted. [55]

* * *

Q. (By Mr. Rankin): You recall that letter of January 30th, saying the contract was canceled on the first of January? A. Yes, sir.

Q. Had you on the 1st of January or at any time previous to this letter of January 30th, received any indication that your contract was not in the same condition and status that it was at all times since August, 1948?

Mr. Ralston: I object to that question, your Honor, unless the question explains what contract he is referring to.

Mr. Rankin: Exhibit 1. I thought it was understood by everybody. If the court please, perhaps, I can save a little time. I feel a great pressure here to keep moving. We have specified the original contract as Exhibit 1, and then when Mr. Mills came along with two letters of November and August, Ex-

(Testimony of Ruth C. Plastino.)

hibits 2 and 6, we found a change in that contract, and in our nomenclature throughout the case we have called that changed contract "said contract" as opposed to Exhibit 1. Now, if we can still use that language, it will save a lot of time in specifying.

The Court: You may use any language you desire.

Q. (By Mr. Rankin): Did you find any change in said contract? Do you understand what I mean when I say that? Do you understand what I mean when I say "said contract"?

A. No, I think I missed the first question between you and the interruption. If I may have it again—— [56]

Mr. Rankin: Let us understand each other first, Mrs. Plastino. A. Yes.

Q. When I speak of Exhibit 1, I speak of the original sales contract between the Mills and the Hogans. A. That is right; I understand that.

Q. Then when Mr. Mills wrote you two letters of November 29, 1946, which is Exhibit 2, and August 16, 1948, which is Exhibit 6, you are claiming, are you not, that those modified or changed the original contract? A. That is right.

Q. Now, then, when we come to this modified or changed contract we call it "said contract."

A. That is right.

Q. When I refer to it I refer to Exhibit 1 as modified by these two letters?

A. That is right.

(Testimony of Ruth C. Plastino.)

Mr. Winslow: I want it strictly understood that the defendants I represent do not construe it that way, but for questioning, yes, that is all right.

Mr. Rankin: As long as this witness understands, that is all I am asking right now.

Mr. Winslow: All right.

Q. (By Mr. Rankin): Had you had any notice of any kind or character—so as to make this general—of any change in your said contract after August, 1948, when he told you you [57] could skip payments? A. Never.

* * *

Q. From August, 1948, which was evidenced by Exhibit 6, up to January 30, 1951, evidenced by Exhibit 18, was there any change in your method of payment and the credits taken, interest charged, taxes charged, any different process than evidenced by these installment payments, Exhibit 24, where you listed all those payments as made?

A. There was no change.

Q. Over those years you adopted—do I understand you correctly, over those years you adopted the same methods?

A. As Mr. Mills originally suggested. [58]

The Court: That is Exhibit 25; not 24. Proceed.

Mr. Rankin: That is right. Thank you, your Honor. 24 is the detail, and 25 is the summary.

Q. When did you receive Mr. Mills' so-called cancellation letter of January 30, 1951, Exhibit 18?

A. February 7, 1951.

(Testimony of Ruth C. Plastino.)

Q. Can you tell the Court why you were so long in receiving that letter? A. Yes.

Q. What was the reason?

A. Our daughter was very ill, and we had gone to Bremerton over the week end.

Q. Where does she live?

A. Bremerton, Washington.

Q. Do you know what day January 30th was, 1951, what day?

A. I believe it was on a Friday.

Q. When you returned——

A. We returned on Sunday, and that was February 4th, and, working all week, we generally write or pay bills or make checks on Sunday, and on Sunday, the 4th, we made a check of \$25 to Mr. Mills.

The Court: On what day?

The Witness: On Sunday, the 4th.

The Court: 4th of February?

The Witness: February.

The Court: You made out a check? [59]

The Witness: Of \$25 for a payment.

The Court: You had not made payment since June of the previous year, had you?

Mr. Rankin: I am coming to that. I hoped to explain this payment first.

The Witness: May I explain a little before that, or shall I explain this payment?

Q. Let us center our attention right now on Sunday.

A. All right, we made this payment on February 4th, a Sunday. Now, being a holiday, Sunday, we

(Testimony of Ruth C. Plastino.)

might have dated the check the 5th for Monday, but we mailed that either Sunday night or Monday morning when I went to work.

* * *

Q. (By Mr. Rankin): Then what did you do?

A. We worked Monday nights until nine o'clock. My husband came down to dinner. We had dinner together, and we went home, and then he called me to tell me there was mail. He said, "We have a receipt here from the postman of a registered letter." Thursday I went to the post office before work and picked up that registered letter, and when I opened the letter it had in it this letter from Mr. Mills telling up [60] that our contract was cancelled as of the 1st of January.

* * *

The Court: I have given you a little extra time, hoping that you have had opportunity to look over all the exhibits. I am going to renew my suggestion that you now designate the exhibits of plaintiff to which you object.

Mr. Ralston: If the Court please, Mr. Winslow and have gone over the entire list of Plaintiffs' Exhibits during the intermission. We are going to object at this time to the following exhibits: First, Exhibits 23, 27, 28 and 29.

Mr. Rankin: Exhibits 23, 27, 28, 29.

The Court: Is that all.

Mr. Ralston: That is all.

(Testimony of Ruth C. Plastino.)

The Court: All of the other exhibits of plaintiff listed in the pre-trial order are admitted. [61]

* * *

Q. (By Mr. Rankin): I hand you, Mrs. Plastino, Exhibits 20 and 20-A and ask you now to put those exhibits in the [65] chronological statement of what occurred as you are giving it.

A. I just have one.

Mr. Rankin: There is a check attached there.

A. Oh, I beg your pardon. This is the check that we had sent out on Sunday to Mr. Mills.

Q. Pardon me. Perhaps you should have Exhibit 19 along with it. I think you will need that.

(Presenting exhibit.)

A. This is a copy of the letter, carbon copy that I had typed at my husband's dictation to Mr. Mills stating that our daughter had been very ill and having eighteen teeth extracted during her pregnancy, and I expected to take care of her working, and my husband had been out of work, and we had just gotten her settled down, and we would appreciate his waiting and giving us permission to skip payments when we were short. [66]

* * *

Q. (By Mr. Rankin): Did you send that letter which is marked Exhibit 19 to Mr. Mills before you received his letter of cancellation?

A. Absolutely did.

Q. Did that letter enclose the check, Exhibit 20-A, which is attached to the envelope and not to that letter? A. That is right.

(Testimony of Ruth C. Plastino.)

Q. Were those forwarded in that envelope marked Exhibit 20?

A. Well, this envelope is the envelope that Mr. Mills sent back to us with his cancellation, with the check. [67]

* * *

Q. Do you recall, Mrs. Plastino, when you did receive that letter, Exhibit 18, dated January 30th?

A. Yes, sir.

Q. When?

A. I went down—the first response when the registered letter comes and no one is home, they take it back and bring it to us, and the second response, if there is no answer, a note is left in the mailbox.

Q. That response came on—I think February 2nd was a Friday, a Saturday in 1945?

A. Due to the war condition, we had no Saturday delivery of mail, and Sunday I had made out this check to Mr. Mills and mailed it, and Monday, as I said, we worked until nine o'clock at night, and Mr. Plastino came from his work and met me, and we had dinner, and when he went home at six or seven o'clock, whatever the dinner hour was, he went home and called me of the mail that was there and told me there was a notice of registered letter left in the mailbox.

Q. When did you pick up the registered letter?

A. Tuesday morning of the 7th I went down to the post office. [68]

* * *

Q. (By Mr. Rankin): The Court made inquiry about why you had these delays in payment.

(Testimony of Ruth C. Plastino.)

Without going into too great detail, will you give a sufficient statement to cover why you did not make these payments at regular intervals and why you did skip them from time to time?

A. Well, after Mr. Mill told us it was all right to skip the six payments, he was sorry Sally was ill and we could skip the six payments and any other payments when we were short. I tried from time to time, with working and taking care of this sick girl and going back and forth with her little children, I tried to keep him posted that we were trying to get on our feet and would make payments just as soon as we could and try to pick up the back payments.

Q. Did you write him letters to that effect?

A. You have carbon copies of my letter that I wrote him.

Q. Why didn't you make the payments?

A. Mr. Plastino was working for the government as an inspector for Rent Control, and those jobs were being closed, and he was laid off. We were helping my son-in-law who was called home from different jobs because of my daughter's serious illness and the babies that she had, and we were really practically taking care of two families, and we wrote Mr. Mills from time to time that we were under terrific [69] pressure and appreciated his letting us miss these payments. [70]

* * *

The Court: I was going to tell you my view of the law at this time for what it may be worth. If I

(Testimony of Ruth C. Plastino.)

am incorrect, you may straighten me out, but I think it might shorten the testimony.

It seems to me that where a person buys property on a contract and makes payments over a period of two or three years, particularly after receiving the type of letter that was received by the Plastino's to the effect that, "You may skip a payment," and particularly where payments have been skipped, the holder of the contract may no longer rely on the [71] provisions in the contract to the effect that time is of the essence and that prior to the time that a default or a forfeiture is declared a written notice must be given to the party giving him a reasonable time within which to make up the past due payments. I think that on the basis of the testimony I have heard from plaintiff—of course, I have not heard the testimony from Mr. Mills—that the forfeiture should not have been made, particularly in view of the letter, Exhibit 16, and particularly in view of Exhibit 17, if that was actually sent and received. [72]

* * *

The Court: When was the original contract recorded, on the 29th of August, 1949?

Mr. Rankin: Right.

Mr. Winslow: And endorsed thereon an assignment from Hogans to the plaintiffs.

Mr. Rankin: Yes.

* * *

(Testimony of Ruth C. Plastino.)

Mr. Rankin: Do I understand that Exhibits 27, 28 and 29 are now admitted?

The Court: 27, 28 and 29 are admitted for what they are worth. [81]

* * *

Q. Mrs. Plastino, I hand you Exhibit 13, 13-A, and 13-B and call your attention to certain check marks that are after the dates of payments as given in that instrument.

* * *

Q. Those check marks, were they on there when you sent that instrument to Mr. Mills?

A. No, they were not.

Q. Were they on there when it was returned?

A. Yes, that is right.

Q. That letter shows the only criticism that Mr. Mills had, is that correct, that is, the one cent difference is all? A. That is correct.

Q. After you went there in November of 1945, how many visits did you make to Tillamook to this property between that and January, 1951?

A. We were there in 1947 and again in 1949.

Q. At what time in 1947 and 1949?

A. The last, the last two weeks of August. That would just take us beyond the last of the month getting back to work [82] just after Labor Day of both years. We took our vacations at the same scene.

Q. At those times did you see Mr. Estber Mills?

A. Those were the only two times I have ever seen Mr. Mills excepting now.

Q. At those occasions did he have anything to say about your payments or the lack of payments?

(Testimony of Ruth C. Plastino.)

A. Not a word; not a word.

Q. Did he make any demand upon you for payment? A. Not a thing; not a word.

Q. For performance? A. No, sir.

Q. In general, without going into detail of your conversation, what was the substance of your conversation?

A. In 1947 after my daughter had written me and we had taken over the property because of her financial condition, he showed Mr. Plastino and I from the highway the approximate lines of the property we were buying. That was in 1947.

Q. What was the next time you visited?

A. And in 1949 after my daughter and son-in-law had assigned the contract over to Mr. Plastino and I we went in to see him, and Mr. Plastino asked him to go to the courthouse and acknowledge the contract in order that he might have it recorded.

Q. Those were all the matters that you remember that had any bearing on this? [S3]

A. All outside of the fact that when he told us when we finished paying up the contract he didn't have any use for the water front. He knew we were going to use it for residence, and we could have it.

Q. In your correspondence are you thoroughly familiar with all that transpired with Mr. Mills and with your husband? A. Yes, sir.

Q. You said this morning something about taking dictation through typewriting.

A. Well, most generally Mr. Plastino will write

(Testimony of Ruth C. Plastino.)

it off in handwriting, and I will type it and a carbon copy, and he signs it.

Q. That is your familiarity——

A. That is our procedure.

Q. I hand you this Exhibit 14 and ask you if that is the first time you became aware of any tax payments that were not confined to the property you were buying?

A. Yes, this was written by me.

Q. Is that your notice to Mr. Mills?

A. Yes, sir.

Q. Did you get a reply from Mr. Mills about that? A. Yes, we did.

Q. I hand you Exhibit 15 and ask if at any time you ever received any information from Mr. Mills correcting the taxes that he had charged, correcting the amount of the taxes that he had charged? [84]

A. Never.

Q. Was there ever any segregation of Lot 8 as disclosed by this map? A. No.

Q. From the the residue of Lot 8 as it is covered in the government surveys?

A. No, Mr. Plastino requested it, but it was never done.

Q. When did you first have notice that timber had been taken from your lot that you were buying under contract?

A. I believe on the evening of Tuesday, let's see, Sunday was the 23rd, Monday the 24th. I would say, I believe, on Tuesday, the 25th, in the evening after we saw Mr. Mills.

(Testimony of Ruth C. Plastino.)

Q. What year? A. 1953.

Q. Had Mr. Mills at any time ever advised you in any manner that he was selling the timber off of your property or this property you had under contract? A. Didn't have any idea at all.

Q. There is some evidence that you had made tenders on February 2nd and the letter of Hathaway, August 24th, and a tender into court. Did you make those covering from 1951 to the time in 1953, did you make any oral tenders in addition to those to Mr. Mills for the rest of the amount due under your contract?

A. On Monday, August 23rd or 24th, we talked to Mr. Mills personally, of 1953. [85]

Q. Where?

A. At his fishing—his place of business at Bay City, Oregon.

Q. What did he say?

A. We went to him. He was not in at first, and we went back later in the afternoon and waited until he came. At Mr. Hathaway's suggestion we told him that we came over to see if we could pay him up in full and could get the deed to the property. He told us that he had cancelled our contract, asked if we received a letter. We said we had never received a foreclose, "We have a letter from you." He said, "You missed some payments, and I paid the taxes;" that he had paid the taxes, and we had missed the payments.

Q. Did he offer to sell you the property?

(Testimony of Ruth C. Plastino.)

A. He said, "I foreclosed on you because I was paying the taxes and you missed some payments." I reminded him he had written us a letter telling us it was all right if we missed six payments, any payments if we were short. I told him we had to get Mr. Hathaway, he was the attorney, and we had seen him. He says. "Has Hathaway got the letter?" I said, "yes, he has." He said, "I'll tell you, I will sell you the property for \$1,200." I said, "You ought to be ashamed to offer that property to us for another sale when we have already paid in close to \$900." Then Mr. Plastino stepped up and said, "We are not interested in any repurchase of this property. We came here at the suggestion of [86] Mr. Hathaway to offer you the full amount including interest of what we owe on that property and ask for a deed." He said, "We feel it is best to try to settle this and save us both money without going into court." He said, "You can go back to Hathaway. I don't give a damn whether you go to court or not. I have a smarter lawyer than you have, and two or three hundred dollars in court doesn't mean anything to me.

Q. Did you visit the property at that time?

A. Not until we went back to Mr. Hathaway and gave him the message of Mr. Mills and left our check with him that he was going to send to Mr. Mills.

Q. Did you go back on the property?

A. We ate dinner and then went back to the property.

(Testimony of Ruth C. Plastino.)

Q. What did you find there?

A. We found a road there and thought at first it was a county road, and we walked up and we found this 14 foot cat road, and trees in the roadways, slashings and as we walked up we saw all the timber gone so we went back home, and the next morning we went down and reported it to Mr. Hathaway.

Q. Did you take any pictures?

A. Not that day. We took the pictures the next day or two after we told Mr. Hathaway what had happened over there. He told us if he were us he would try to find out who cut the logs in there and how they were cut.

Q. What did you take the pictures for? [87]

A. To show the condition of the property and the slashings that were left in the roadway and the way the property had been, I would say, from what he had wanted to purchase it for. It had practically been just devastated as far as trees and shrubs, natural growth on the property.

Mr. Rankin: You may cross-examine.

Cross-Examination

By Mr. Winslow: [88]

* * *

Q. Now, the record shows that— you have testified of receiving this notice from Mr. Mills, a letter stating your contract had been cancelled. You remember that; do you not? A. Yes, sir.

(Testimony of Ruth C. Plastino.)

Q. Have you ever written, telephoned, or corresponded with Mr. Mills in any way after receiving that letter along about the 1st of February, 1951?

A. On the advice of my attorney in Seattle——

Q. Just answer my question, please.

A. No. [98]

* * *

Redirect Examination

By Mr. Rankin: [113]

* * *

Q. How did you, after January 30, 1951, when you got the alleged cancellation letter, again communicate with Mr. Mills?

A. My attorney in Seattle said, "When a man sends you back a check and tells you he is going to foreclose, your move is not the next one; it is his, and you wait until you get a notice of foreclosure, and you have your check ready to tender to your attorney."

Q. You did not get any notice of foreclosure from Mr. Mills? A. Not at all.

Q. Did your attorney say that you had gotten a letter of foreclosure? A. No.

Q. Well, then, I did not understand your answer. When you got this letter of cancellation did you discuss it with your lawyer?

A. That is right.

Q. Your lawyer's advice was what?

A. Was to sit tight and wait until I got a notice of foreclosure.

(Testimony of Ruth C. Plastino.)

Q. Did he say further what you should do?

A. Then he said, "If I were you, I would get my contract up-to-date and take your last statement from the man you are buying it from and be ready to tender that check into court to save your equity in the——"

Q. Was that the reason you made no further communication [114] with Mr. Mills?

A. That is right.

Q. When you delivered this \$675—was it a check? A. That is right.

Q. \$675 check, was that a check that you had from the previous series of payment?

A. No, sir.

Q. Where did you get the number?

A. We have a letter from Mr. Mills, on the back on it, telling us what the balance was. When we wrote back up to ask if our balance was correct, the taxes were always a little bit confusing, he said that our balance to date is so much. That is the letter we had from him. [115]

* * *

ESTBER MILLS

defendant, called in his own behalf and on behalf of defendants, having been first duly sworn, was examined and testified as follows: [121]

* * *

Cross-Examination

By Mr. Rankin: [128]

* * *

Q. (By Mr. Rankin): You took up with them the matter of their payments when they were there in 1948 or 1949? A. Yes, sir.

Q. You never made any written demand on them? A. No, sir.

Q. After 1948 and 1949 they continued to be delinquent or even skipped payments; did they not?

A. I think so; yes, sir.

Q. They did, didn't they?

A. Yes, sir, I think so.

Q. Did you make any objection after 1948 or 1949? A. No, sir. [130]

Q. Why not?

A. I am not much of a hand to write letters.

Q. You wrote some. It was not important enough for you to have your contract kept up-to-date that you would write them if you were insistent upon their making their payments?

A. I tried in every way I could to have those people pay, everything to help them in all I could, paid their taxes, everything else.

* * *

(Testimony of Estber Mills.)

Q. Now, you say at the time you sold that it was worth \$50; is that true? A. Yes, sir.

Q. Didn't your conscience hurt you when you charged these kids \$1,575.

A. I don't believe it does if they come after you, I don't know that it does.

Q. It does not hurt your conscience?

A. Pardon?

Q. It does not hurt your conscience?

A. No. [131]

Q. I think that is probably true.

Mr. Ralston: I move to have that stricken.

Mr. Rankin: That is agreeable.

Q. You say you did not know—the reason for your putting it down to \$50 was because you did not know it had been logged off before; is that right?

A. That is right.

Q. I hand you Plaintiff's Exhibit No. 11 dated April 6, 1949, and ask you if that is your recollection now of when it was—ask you whether or not you have any recollection now about that property being logged off?

A. The question is what now?

Q. Does that refresh your memory to the effect that you did know as early as April, 1949, that it had been logged off? A. Yes, sir.

Q. You also passed judgment on the timber that was left there in 1949 also in that letter, didn't you?

A. No, sir.

Q. Don't you say, tell these people that you do

(Testimony of Estber Mills.)

not think it is worth their while to attempt to log the rest of that?

A. Well, yes, no specific price. [132]

* * *

SIGMUND WENDLING

a defendant, called in his own behalf and in behalf of defendants, having been first duly sworn, was examined and testified as follows: [139]

* * *

Q. When you sold this timber you attempted to sell it to the Publishers' Paper Company, did you not, Mr. Wendling? A. I did.

Q. What price were you putting on it [152] then?

A. The exact price that I was trying to get, \$1,500 out of it. That is all I wanted out of it, just what I had in it.

Q. I call your attention to Exhibit 30 which is the agreement between Publishers' Paper Company and Sigmund J. Wendling and ask you if you fixed any price there for the timber that you were selling? A. That is right.

Q. You did ask them how much per thousand?

A. They stated a price they would give me per thousand, and it was put into this.

Q. You agreed to sell it for that?

A. I did.

Q. What were the prices then?

(Testimony of Sigmund Wendling.)

A. The price here is \$31 per thousand on No. 2 and No. 3, spruce and hemlock.

Q. Did you think that was a fair price at that time?

A. That was more than a fair price. I was tickled to death if I could have got that.

Q. Quite a bit more than you testified as to the value now? That was quite a bit more than you would testify as to the value now?

A. It isn't worth that much now at all. [153]

* * *

W. HENRY THOMAS

recalled, testified as follows: [159]

* * *

Redirect Examination

By Mr. Rankin:

Q. Mr. Thomas, from your experience, where there is a stumpage cruise with some subsequent tally that indicates accurately, such as the cruise of a third party who is competent to make cruises, what has been, in your experience, the relevancy of the stumpage cruise with respect to an actual cruise or an actual tally, I should say?

A. Well, they have been very close.

Q. What degree, if any, of variation does your experience tell?

A. I would want to modify that, but I would answer that this way, Mr. Rankin: Cruising timber in

(Testimony of W. Henry Thomas.)

itself is not an exact science. Ten per cent leeway, plus or minus, is not out of line. When you get into a stump cruise, if the stump cruise is made properly, the man making that, knowing the inaccuracy or the errors that are apt to develop in a timber [171] cruise, has to be more conservative, and he must allow for other things, unforeseens. I would just say that in a stump cruise you could be off 15 per cent plus or minus. [172]

* * *

RAY DOUGLAS

a defendant, called in his own behalf and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow:

* * *

Q. What did you do with the contract or whatever you got from Mr. Mills? What did you do with it?

A. Well, Mr. Wendling came up to the beer tavern. My brother and I operate a beer tavern, and Mr. Wendling and I got acquainted through there. He would come in and drink a bottle of beer once in a while, and he was asking me, said he heard there was a little bunch of timber over there. He wanted to know—he knew that I knew Joe Mills, I had dealt with Mills. We had a couple of deeds.

(Testimony of Ray Douglas.)

Q. A little louder. [175]

A. He financed for a couple of deeds. So he says he would like to get hold of that little bunch of timber over there just to hold him through the summer. He didn't have nothing to do, and he told me that he would give me a hundred dollars if I could make a deal with Joe. He didn't know Joe, and I knew Sig. I says, "Well, if I can get the timber for you, it won't cost you a dime. You are a good customer of mine. I will do what I can." He says, "I will give him \$1,500 for it if you can get it." So he gave me the cash, fifteen one hundred dollar bills. I went up to Joe's Cannery. Joe said, "Sure, you can have it for that." We went up to the place, and Joe wrote out, got the description of the land where it was at. He wrote me out a contract for it. I took it back to the beer tavern. Wendling was still there. I signed my name to it right over to him, and Mr. Wendling had the contract.

Q. You gave Mr. Mills Mr. Wendling's money?

A. I gave Mr. Mills the \$1,500 cash. [176]

* * *

Cross-Examination

By Mr. Rankin: [179]

* * *

Q. What did he say about your buying the property, or how much did he ask you to pay for the property? Didn't he offer to sell you the whole Lot 8?

(Testimony of Ray Douglas.)

A. You mean the timber or——

Q. Well, I do not know. I am asking you. Didn't he offer——

A. No, I asked Joe what he would take for the timber. He said, "What will you give me for it?" "Well," I said, "I got \$1,500 I can give for it."

Q. Then didn't he say, "I will sell you the land, too"? A. Yes.

Q. Yes, and how much did he want for the land outside of the timber if you would buy it?

A. He offered the lot and timber. He says, "You can have the land." I says, "I don't want it." [180]

* * *

CLARENCE K. WARREN

a defendant, called in his own behalf and in behalf of defendats, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow: [182]

* * *

Q. Who assisted—did you have any partnership or any joint operation with any other of the defendants?

A. George Hodgdon and I logged it.

Q. That is what I am trying to find out.

A. Yes.

Q. Now, let me ask you this. Where did you sell your logs that were taken off of that property?

(Testimony of Clarence K. Warren.)

A. Sold it to Publishers' Paper at Manhattan.

Q. Any other place?

A. We sold approximately around 9,000 feet to the Oregon Pulp. We sold three loads of short logs on a short log truck which would run about, oh, I would say it would have been around twenty-five to three thousand feet to the load that we sold to the Oregon Pulp.

Q. How much did you sell to Publishers'?

A. Oh, I would say around 165,000 feet, 160,000 or 165,000, something like that.

Q. Did you and Mr. Hodgdon remove from that property all the timber that was taken out? Was there any other timber taken out except by you and Mr. Hodgdon?

A. No, sir. [185]

* * *

Q. What timber was left there when the operation folded up?

A. Well, I figured there was around approximately 75,000 on the west side of the creek. I went in there, and I felled and bucked in there, I figured 40,000 feet.

Q. Half of it was felled and bucked and the rest of it was standing?

A. The rest of it was standing. [186]

* * *

Mr. Winslow: I just want to get the transaction. Did Mr. Harveston take over the balance of this timber?

A. Yes, sir, he did.

Q. Did he pay you anything for it?

(Testimony of Clarence K. Warren.)

A. He gave me \$225, a check for \$225, and I paid for the contract. It was \$25 for drawing up the contract. [190]

* * *

The Court: For \$225 after you obtained an extension from Mr. Mills, is that——

The Witness: Yes, I went to Mr. Mills and asked for some more time.

The Court: To remove it?

The Witness: Yes, the time was up. I think it was the 5th of October, and I went to Mr. Mills, and I asked him if I could have more time on it, and he says, "You sure can," he says, "How much do you want?" I said, oh, "Give me a year on it." He said, "Well, let us make it up for six months, and if you need any more you come back, and I will give it to you." And I turned around, and I sold it to Red Harveston then.

* * *

Cross-Examination

By Mr. Rankin:

Q. Mr. Warren, when you started your dealing with this timber did you make any investigation as to the title to it? A. No, I didn't. [191]

Q. That is, did you ask Mills whether he had any outstanding contract?

A. I did not know Joe Mills at the time.

Q. Did you make any investigation on the records of the county? A. No, sir.

(Testimony of Clarence K. Warren.)

Q. When the Plastinoes spoke to you did they tell you that they did not know who would be made defendants in this case; that that was up to their attorney?

A. They told me that Joe Mills was the one they would hold liable.

Q. Just answer my question, Mr. Warren. Did they tell you that who would be made defendants was up to their attorney? Who would be made defendants in this case was up to their attorney?

A. No, sir. [192]

* * *

Q. So you do not know what was taken off by you in the shape of board feet?

A. Yes, I do. We took out 165 to 170,00 feet.

Q. All right, how do you know that?

A. Well, we got paid for that anyway.

Q. Where is the scale upon which you were paid? [194]

A. George Hodgdon has it.

Q. You do not have any records of that nature?

A. No, sir, he had his own bookkeeper, and she took care of the whole works. [195]

* * *

Q. Did you know Lyle Simmons in this deal?

A. Yes, sir.

Q. When did you meet him?

A. I have knew him for five years.

Q. When did you meet him in respect to the deed?

(Testimony of Clarence K. Warren.)

A. I went to him, asked him if he wanted to go into partners with me on it.

Q. Did you buy any of Simmons' interest?

A. No, sir.

Q. Do you know who did buy Simmons' interest?

A. Yes, sir.

Q. Who? A. George Hodgdon.

Q. Do you know what he paid Simmons for his interest? [198]

A. Well, he told me, I think it was around \$400. That is for his labor.

Q. You and Hodgdon were in partnership on this; were you not?

A. Yes, we were.

Q. Did you know how much your partner paid Simmons for his interest in the timber?

A. It was either \$400 or \$450; I don't know which.

Q. Simmons would not go on with this deal, would he? A. No.

Q. Why did he get out?

A. Well, because I didn't get a contract on it right away. [199]

* * *

LYLE SIMMONS

defendant, called in his own behalf and in behalf of the defendants, having been first duly sworn, was examined and testified as follows: [237]

* * *

Cross-Examination

By Mr. Rankin:

Q. Did you give all of that conversation, Mr. Simmons?

A. Possibly not. I don't remember just exactly all that conversation we did have.

Q. Do you recall that in that conversation you said you got out because the job stunk?

A. I did.

The Court: What do you mean by the fact that the job stunk?

The Witness: At that time we was working in there without a contract. We never had anything to show that we should be in there.

The Court: From whom did you think you ought to have a contract?

The Witness: Mr. Wendling. He was the man that Warren dealt with on the timber, but for some reason they kept putting it off.

The Court: Did you know about the Plastinoes?

The Witness: I did not know a thing about the matter until he come to my house.

The Court: That is what you mean when you said that the job stunk; you thought you ought to have a contract?

The Witness: That is right, just the same as we

(Testimony of Lyle Simmons.)

were in there stealing it. Without a contract we had no business [241] in there.

Q. (By Mr. Ranklin): Did you inquire, make any title research or have any inquiry about it yourself?
A. Not a bit. [242]

* * *

OSCAR TITTLE

defendant, called in his own behalf and in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Winslow: [243]

* * *

Q. Well, now, this one item has been developed here that it was your equipment that built this road in on this Lot. 8. Do you know where that lot is, of course?
A. Yes, well——

Q. Yes?

A. I didn't know what lot it was on. I built a road in there.

Q. But you recognize the property, the lot here in court that we are talking about here; do you not?
A. Yes, I do. [244]

* * *

Q. * * * Let us see what you were paid for it.

(Witness consults document.)

A. On May 19, 1952, we moved in on May 19th

(Testimony of Oscar Tittle.)

and did some more work on May 30th, and on May 31st we finished up, and the total amount of the bill was \$283.37.

* * *

Q. It was your equipment and your hired men?

A. When we move those cats, we have to pilot them according to the State Highway Laws, and I piloted the cat out there with my car, and they unloaded, and I left. [245]

* * *

FRANK M. STEVENS

a witness produced in behalf of plaintiffs, having been first duly sworn by the Court, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

Q. Where do you live, Mr. Stevens?

A. Tillamook, Oregon.

Q. How long have you lived there?

A. About thirteen years.

Q. What is your business?

A. Real estate salesman. [253]

* * *

Q. (By Mr. Rankin): Have you an opinion, Mr. Stevens, as to the value of this Lot 8?

A. Yes, I have.

Q. Is this opinion fixed on the date of approximately June, 1952?

A. It is based on the property as I could recon-

(Testimony of Frank M. Stevens.)

struct as to the best of my ability after looking it over. If that is the date, that is correct.

Q. What is your opinion as to the value?

A. Between \$3,200 and \$3,500. Now, Mr. Kerr and I have debated the question. We have discussed it. We looked it over together. We had some differences of opinion. We were not able to arrive at a very definite figure. As a compromise, however, we did agree that somewhere between \$3,200 and \$3,500, in our opinion, the property would be salable for.

Q. You looked at it this morning?

A. Yes, sir.

Q. What do you think the value of it is now as of this date?

The Court: Is that an issue in this case?

Mr. Rankin: It shows the difference in value from the time before the removal of timber to the date now.

The Court: No, you are going to have to do it immediately after the removal of the timber.

Mr. Rankin: The timber was removed, the last of the [261] timber under the contract, so far as we know, just prior to expiration of that contract in December, 1953.

* * *

Q. (By Mr. Rankin): What do you think your value of this particular tract, Lot 8, is now?

A. Well, as a result of our observations and taking into consideration several different factors, I would consider it reduced by 75 per cent.

Q. Did you find any slashings, logs, left on the

(Testimony of Frank M. Stevens.)

property? A. Yes.

Q. When you inspected this morning?

A. Yes, sir.

Q. Is there much of that?

A. Well, I would say there is quite a little bit.

Q. You spoke about the fact that you did not find that there was the same type of terrain for the purposes of view in other places as there was in this particular tract, Lot 8. Can [262] you enlarge upon your observations with respect to that in comparison with other property?

A. Well, the view from Lot 8 I would consider quite extensive. From the, it would be the north portion of it on the south slope there, the southwest slope, you have a very extensive view of the bay and the bar and the ocean, the City of Garibaldi, Bay Ocean, and, roughly going over in my mind, going back towards Tillamook, a comparable terrain through there would be the Malarky tract closer to Bay City. However, the view there would certainly not be the same. The A. F. Coate tract or what is commonly known as Hobsonville Point is, which is for sale and is excellent view property; however, I would not consider it exactly the same category.

Q. Which would you think preferable?

A. Primarily from the view standpoint, I would say Lot 8.

Q. Is there any territory or any part of this Lot 8 that is level?

A. Some of it; very little of it.

(Testimony of Frank M. Stevens.)

Q. With respect to that along the road, would that be adaptable to a motel?

A. Oh, I think so. [263]

* * *

RICHARD D. KERR

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rankin:

* * *

Q. How long did you live in Tillamook?

A. Six years.

Q. During that six years what was your occupation and business?

A. I have been a real estate broker about four years.

Q. What did you do prior to being a real estate broker? A. State Police Officer.

Q. During those four years have you sold any property in Tillamook? A. Yes, sir.

Q. I referred to the county. Have you sold any in the City of Tillamook? [281]

A. County and city both.

Q. Are you familiar with Lot 8 as we have termed it here? A. Yes, sir.

Q. You know what I mean by Lot 8?

A. Yes, sir.

Q. The Plastino tract. When did you see that

(Testimony of Richard D. Kerr.)

property? A. This morning.

Q. In company with whom?

A. Mr. Stevens.

Q. Did you satisfy yourselves where the lines were? A. Yes, sir.

Q. Do you know the size of the lot?

A. Yes, sir, that is, I am satisfied with the lines as they are brushed out, if those are the correct lines, I am.

Q. The testimony is to the effect that Mr. Marshall did making some brushing-out of those lines. Did you have any sales of property of that nature?

A. Yes, sir.

Q. How long ago were those sales?

A. In the past two years.

Q. Where were they located?

A. Well, there was two sales—they are not entirely the same property.

Q. That would be impossible, to get the exact property, would it? [282]

A. Within five or six miles of the area.

Q. In going over this property then what did you determine were its valuable features, if you found any? A. You mean in its state now?

The Court: The valuable feature that I would see there now.

The Witness: There still is some there. I don't know how much because I am not a timber cruiser, and then there is reforestation possibilities along with the balance of the standing timber.

Q. (By Mr. Rankin): What with respect to

(Testimony of Richard D. Kerr.)

residential possibilities upon a development that might occur later?

Mr. Winslow: I am going to make a little objection, "might occur," probably, that is what we are interested in.

Q. (By Mr. Rankin): Possibly, probably, all right.

The Witness: Would you repeat your question, please?

Q. Did you find any values there that might be attributable now to residential purposes, that probably would occur and develop?

A. There is one portion of the property that has been logged. That, if it was planned right, might have or would have a residential value.

Q. You have told me where the other sales, I think you mentioned one. Where are the other sales similar to this?

The Witness: Well, the other sale I had in mind—— [283]

The Court: He did not tell us where, what the sale was.

The Witness: Do you want them testified to, the lot and block?

The Court: If you have the name of the seller and the buyer.

The Witness: The property was the R. L. Miller tract, a 20-acre tract, 18 acres of timber brush land, and 2 acres of brush and a house sold for \$6,000.

The Court: How many room house?

The Witness: It would be a four-room house,

(Testimony of Richard D. Kerr.)

and the other tract was a 2-acre tract behind Bay City. That sold for \$250.

Q. (By Mr. Rankin): Similar type of land?

A. It would be a similar type in some respects. I mean, there would be variations.

Q. Did it have view possibilities of a view such as this?

A. Yes. It would have—I based that on what I would feel that a 2- or 5- or 8-acre tract, it would depend on how many acres I would have to give to them, but such has a bearing on the upper portion of that land, is where I would base that variation of around \$250.

Q. From your inspection and your familiarity with these properties in and around Tillamook, have you an opinion as to the value of Lot 8?

A. As of what date? [284]

Q. As of June, 1952?

A. If that is the date before the timber was logged?

Q. That is right.

A. I would place the value, in my opinion, of approximately \$3,400.

Q. You say before the timber was removed?

A. That is right.

Q. You saw the lot this morning where the timber has been removed. What would you say the value would be now?

A. Well, that would depend upon how I—or how somebody sold the property, whether it was sold, if somebody went in and was able to sell one or two

(Testimony of Richard D. Kerr.)

residential sections we would place a value on them. If it was sold for a tree farm and the balance standing timber to a large company, we would place another value on it.

Q. Well, the testimony is it was purchased for residential purposes. The plaintiffs claim they did not have in mind any reforestation, but they did have in mind a motel, residential purposes.

Mr. Winslow: I do not recall that testimony myself.

Mr. Rankin: Oh, yes, the daughter told them about it. They went down there and confirmed it.

Mr. Winslow: I do not recall it.

The Witness: What question do you want me to answer?

The Court: The question is objected to anyway because [285] it would not make any difference what they had in mind. The question is what is the highest and best use of that property at either of these two dates.

Do you want to take an objection to that?

Mr. Rankin: What I had in mind was that it did have some value or that it did some relevancy as to what these individuals purchased the property for. There is not a development of a similiar nature for this kind of property that I know of around there. There is going to be one some day. There is somebody going to have to pioneer into that field of development. There are hills there that have houses on them. They are going to look for views; consequently, if these people found a value there

(Testimony of Richard D. Kerr.)

for that and a desirability, then the value would follow in their desire to improve that property.

The Court: That is not basis of determining the damages, Mr. Rankin. I am sure that if Meier & Frank Company wanted to build a department store and wanted it for that purpose, it would be worth many, many thousands of dollars, but you cannot determine a value on a basis of speculation and possibility. It must be a price. All these factors must be reflected in the market value of the price.

Mr. Rankin: I think your Honor is correct.

Q. What would you say, Mr. Kerr, is the fair market value of Lot 8, at the present time, taking into consideration your [286] experience, the sales that you know of, and your review of the property itself?

The Witness: Approximately \$1,200. [287]

* * *

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the district of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer of defendant George Hodgdon; Answer of Estber Mills and Edna Mills; Answer of Ray Douglas, et al; Pre-trial order; Findings

of fact and conclusions of law; Opinion; Judgment; Objections to findings of fact, conclusions of law and judgment; Order overruling objections; Notice of Appeal; Cost bond on appeal; Designation of record; Order for transporting original papers and exhibits; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7293, in which Michael R. Plastino and Ruth C. Plastino are plaintiffs and appellants and Estber Mills, et al, are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00 and that that the same has been paid by the appellants.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, (Volumes 1 and 2). Under separate cover we are forwarding plaintiffs' exhibits 1 to 56, inclusive and defendants' exhibits 100 to 106, inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District this 13th day of June, 1955.

[Seal]

F. L. BUCK,
Acting Clerk.

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 14789. United States Court of Appeals for the Ninth Circuit. Michael R. Plastino and Ruth C. Plastino, Appellants, vs. Estber Mills and Edna Mills, Husband and Wife; Ray Douglas and Pauline Douglas, husband and wife; Sigmund Wendling and Dorothy Wendling, Husband and Wife; Loran D. Harveston, Lyle Simmons, George Hodgdon, C. K. Warren and Oscar Title; Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14789

MICHAEL R. PLASTINO and RUTH C. PLAS-
TINO, Husband and wife,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, Husband
and Wife; RAY DOUGLAS and PAULINE
DOUGLAS, Husband and Wife; SIGMUND
WENDLING and DOROTHY WENDLING,
Husband and Wife; LORAN D. HARVES-
TON; LYLE SIMMONS; GEORGE HODG-
DON; C. K. WARREN; and OSCAR TITTLE,

Appellees.

STIPULATION

It is stipulated between the undersigned parties that in lieu of printing the depositions of Loran D. Harveston, George Hodgdon and C. K. Warren, the narrative statement of their testimony in such depositions, which is recited in the Pretrial Order dated May 20, 1954, and signed by the Court and the respective parties and which will be printed in the transcript of Record under the supervision of the clerk of the above entitled court, is a fair and sufficient statement of the material matters as to appeal before the appellate court, and the printing of said depositions may be dispensed with.

Dated June 17, 1955.

/s/ ROBERT R. RANKIN,
Attorney for Plaintiffs-Appellants.

GEORGE P. WINSLOW, and
WM. C. RALSTON,

By /s/ WM. R. RALSTON,
Attorney for Defendants-Appellees,

/s/ IRVING RAND,
Attorney for Defendant-Appellee, George Hodgson.

[Endorsed]: Filed June 23, 1955.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Appellants intend to rely upon the following points on appeal or the above-entitled cause that:

1. Jurisdiction is supported by diversity of citizenship and an amount involved in excess of the statutory requirement and applicable appellate statutes.

2. Trial Court erred in not finding and decreeing the whole contract between appellants and appellees Mills, including the modifications of the

original and appellants assumption of and performance of the entire contract when

(a) Appellants preserved their right to specific performance by their own performance and tenders, and

(b) Appellants did not breach or abandon the contract.

3. Trial Court erred in not finding and decreeing appellees Mills breached and attempted cancellation of their own contract as modified and performed, when appellees Mills

(a) had waived material parts of the original contract upon which their attempted cancellation was based;

(b) gave no notice to appellants of a reasonable period for performance before attempted cancellation;

(c) declared and attempted to enforce a forfeiture on waived provisions of the contract.

(4) Trial Court erred in not finding a confederacy between appellees by which they logged appellants' property and caused damage which should at least be doubled in amount.

(5) Trial Court should have abated the purchase price in accordance with the area purchased.

(6) That appellees come into court with "unclean hands."

(7) That appellants are entitled to specific performance and damages.

/s/ ROBERT R. RANKIN,
Attorney for Appellants.

To Wm. C. Ralston, George P. Winslow, and Irving
Rand,

Public Service Building, Portland, Oregon,
Attorneys for Appellees.

Service of copy acknowledged.

[Endorsed]: Filed August 10, 1955.

United States
COURT OF APPEALS
for the Ninth Circuit

MICHAEL R. PLASTINO and RUTH C. PLASTINO,
husband and wife,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, husband and
wife; RAY DOUGLAS and PAULINE DOUGLAS,
husband and wife; SIGMUND WENDLING and
DOROTHY WENDLING, husband and wife;
LORAN D. HARVESTON; LYLE SIMMONS;
GEORGE HODGDON; C. K. WARREN; and OS-
CAR TITTLE,

Appellees.

APPELLANTS' OPENING BRIEF

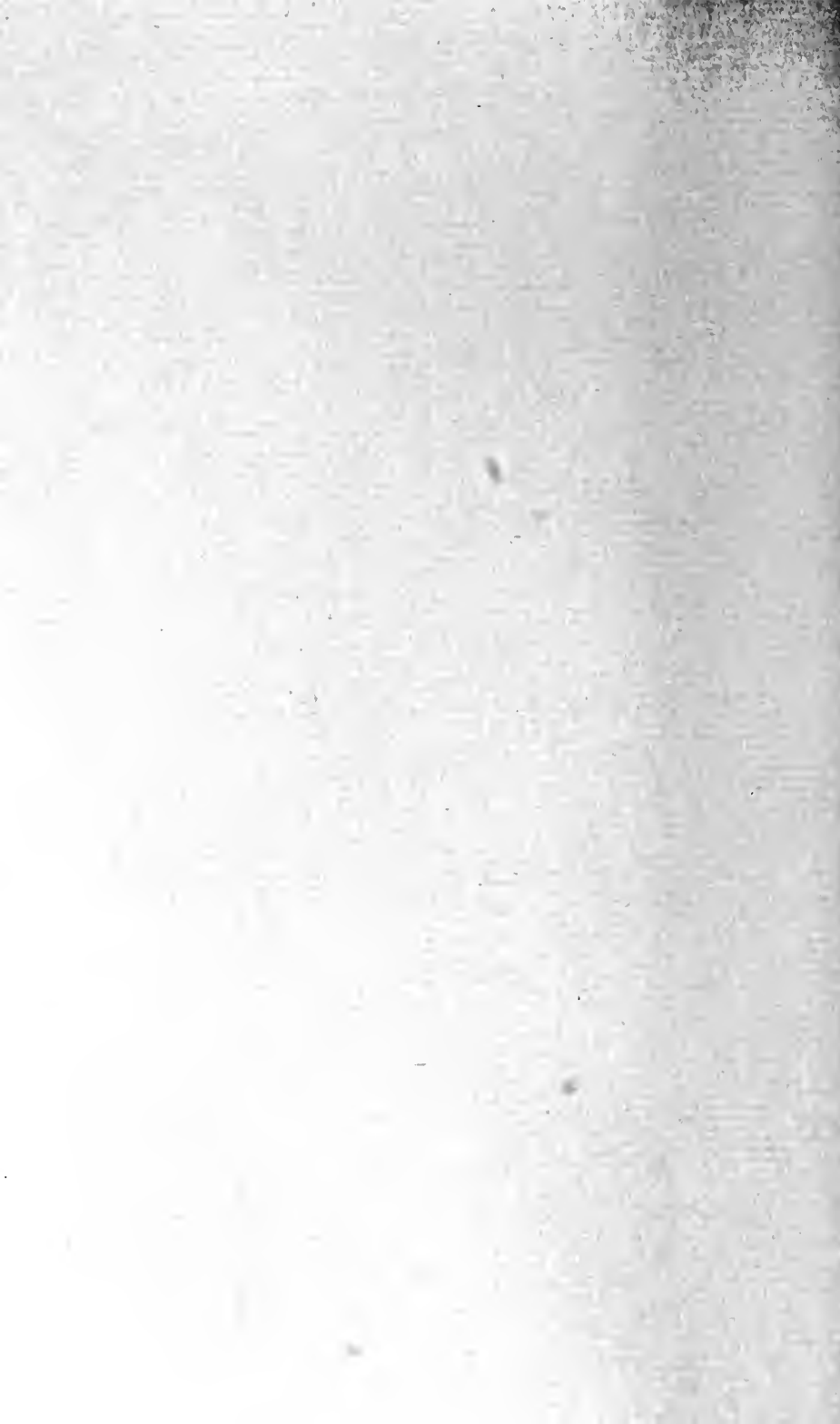
*Appeal from the United States District Court for the
District of Oregon.*

ROBERT R. RANKIN,
710 Yeon Building,
Portland 4, Oregon,
Attorney for Appellants.

FILED

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PAUL P. O'BRIEN, CLERK



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United States
COURT OF APPEALS
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MICHAEL R. PLASTINO and RUTH C. PLASTINO,
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DOROTHY WENDLING, husband and wife;
LORAN D. HARVESTON; LYLE SIMMONS;
GEORGE HODGDON; C. K. WARREN; and OS-
CAR TITTLE,

Appellees.

APPELLANTS' OPENING BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

I. JURISDICTION of the United States District
Court for Oregon is conferred by 28 U.S.C.A. §1332 when
proof resulted in a stipulation (Tr. 6) that *diversity of
citizenship* existed when all plaintiffs were citizens of
Washington and all defendants of Oregon. The *amount*

involved exceeded \$9,810.61 which included \$1,200 as the value of the land for conveyance of which specific performance is asked. This sum is the exact amount demanded by owners Mills for a deed after his alleged cancellation (Tr. 92). This valuation was *in addition to what had been paid by* appellants and after most of the *timber had been removed*. *Johnson v. Tapp*, 33 F. 530, 532; *Mattinson v. King*, 150 F. 48, 54. The residue of the amount involved is damages, detailed later (p. 29).

The United States Court of Appeals for the Ninth Circuit has jurisdiction over *reviewable decisions* of said District Court in its appellate circuit under 28 U.S.C.A. §1294, and from all *final decisions* of said District Court under 28 U.S.C.A. §1291. The final decision herein was an order of said District Court made on April 25, 1955, under Rule 73(a) F.R.C.P. denying the plaintiff-appellants' objections and motion made under Rule 52(b) F.R.C.P. to correct the many errors in the findings, conclusions and judgment of said District Court. Notice of appeal was filed May 23, 1955 (Tr. 61).

II. STATEMENT OF THE CASE: Appellants' "Contention of Facts" (Tr. 12-26) was substantially taken from appellees' depositions and substantially proven at trial. (1) *The contract* (Tr. 7) was between Estber Mills and Edna Mills, sellers, and R. F. Hogan and Sally Hogan, buyers, husbands and wives, respectively. It is disclosed in several forms—the original, a photostat copy to prove its recording (Ex. 1), a photostat copy attached to the complaint and Mills' unexecuted copy (Ex. 100) to show his accounting of payment on the back thereof.

The premises owned by Mills alone (Tr. 7) are briefly herein described as Lot 8, situated on a flat promontory between the cities of Garabaldi and Tillamook, having potentialities for residential development, with a view of ocean, coast line and hills, in the neighborhood of fine homes, but brushy, timbered and undeveloped. The features appealing to the buyers are described (Tr. 74-5).

Before modification the contract provisions relevant to errors charged to the trial are—the balance of \$1,475 of the purchase price was to be paid in monthly installments of not less than \$25 on the first day of each month. In addition, buyers were to pay taxes, also interest at 6% on the unpaid balance semi-annually. Time of payment and strict performance were made of the essence. On breach, Mills had the right to declare “this agreement null and void and foreclose by strict foreclosure in equity.” Also, failure by Mills at any time to require performance by vendees “shall in no way affect their right hereunder to enforce the same, nor shall any waiver by (the sellers) or of any succeeding breach of any such provision, or as a waiver of any succeeding breach of any provision, or as a waiver of the provision itself” (Ex. 1). It was assigned by Hogans to Plastinos (Tr. 7).

The contract went into effect Nov. 7, '45. It was performed until November '46, with these exceptions: In April, October and November '46 buyers failed to pay the \$25 installments as above described. Mills did not follow the contract but did exactly as he later described in his letter of Nov. 29, '46 (Ex. 2) to vendees. The italics are ours and the letter is as follows:

"Received your letter regarding interest on your contract. *I have not followed the contract as it was written. I have charged you with interest as you made your payments and applied the ballance (sic) to the principal.* In doing it this way you will save a few dollars. I have outlined to you just how it has been done, so if you will take your contract and apply these payments as I have you will find the interest is less, but you will owe more on the principal than you thought you owed.

"The \$25.00 a month is all right with me. Or if you want to pay more that will be all right also. But if I were you I would pay the \$25.00 and *I will take the interest out as you go along.*

"*I had to pay the taxes which I added to the bal. (sic)* You will notice on your tax receipt that there was one acre take (sic) off. This small piece of land lies west of the highway which was in this parcel of land. I kept this out for some of the fishermen have a small house on it. * * *" (Tr. 14).

Thereafter, Mills charged the interest and paid the taxes and included both amounts in the unpaid balance (Mills Dep. 18, 25, 26). Mills followed the above procedure with the Hogans and the Plastinos (Dep. 33). He never advised the vendees of any change in the directions given in Ex. 2 (Dep. 19; Tr. 78). Performance was had by payments (some in advance) through '47 and '48 until on Aug. 16, '48 Mills wrote another letter in answer to the vendees' letter (Ex. 5) describing the conditions surrounding their daughter's family and asking permission to "skip" the August payment until they caught up with their obligations because they were "short" of money (Tr. 76-77). Mills wrote:

"Your letter received and I am just getting around to answer. I am very sorry to hear of your daughter's sickness and hope for the best for her recovery.

"It is quite all right to skip your payment for August and any other time when you are short."
(Italics ours) (Ex. 6) (Tr. 14-15)

There were no changes in the contract after Aug 16, 1948. Plastinos were never told anything different at any time (Tr. 77, 96).

II. (2) Practically the only *Performance of the Contract* required of vendees was payment to be made in \$25 installments, including interest and taxes, when appellants were not short of money (Ex. 2, 6). Vendees were paying 6% interest for any delays in payment (Ex. 25).

Mills gave no notice of failure or objection to performance through the last payment made about July 1, '50 and for seven months thereafter. The terms dictated by Mills were followed. There had been some "skips" in payment; taxes and interest were added to the unpaid balance and installment payments applied *pro tanto* (Tr. 96). Mills never made any written or oral objection to delayed payments nor made any demand for any payments of installments (Tr. 8) (Dep. 47).

Appellants wrote Mills (Ex. 12) in Feb. '50 requesting a check of their accounting. Mills replied in March (Ex. 13) approving the accounting (Dep. 29) except there was 1¢ difference and they had made 45 installment payments in place of 44 as vendees reported (Ex. 13-A; Dep. p. 29 et seq.).

The first friction occurred in March '50 when Mills reported \$124.77 due him for taxes (Ex. 13, 46) (Dep. 30). Previous taxes were '46-'47, \$34.36 (Ex. 7), '47-'48, \$40.-23 (Ex. 8), '48-'49, \$55.35 (Ex. 9). On April 19, '50, appel-

lants complained that the tax on tidelands not purchased by them was included by Mills in their tax bill (Ex. 14). To this Mills agreed and took "the blame" (Ex. 15; Dep. 43), but made no adjustment in the balance to appellants. Nor did he keep his promise (Ex. 15) to have the taxes segregated or the statements sent direct from the Sheriff. Performance by appellants is shown of record (Ex. 24, 25; Tr. 75-6).

No installment payments were made from July '50 to Feb. '51 when a \$25 installment was made and refused (Ex. 19, 20, 20-A). Mills had been previously advised of the reasons for nonpayment and promised payments by appellants (Ex. 16, 17). During this period, Mills made no objection. Mills attempted to cancel the contract Jan. 1, '51 (Tr. 79).

II. (3) Appellants claim *Mills breached their contract* when Mills sent the "cancellation" letter postmarked Jan. 31, '51, advising: "Your contract was cancelled January 1, 1951 for failure to keep up your payments and taxes" (Tr. 8; Ex. 18). Mills testified he did not know why he had attempted to cancel the contract (Ex. 18) (Dep. 50). It was received by appellants Feb. 7, '51 (Tr. 81) after receipt by Mills of appellants' letter of Jan. 25, '51 advising they would soon start payment and explaining why they had been "short" of money (Ex. 17).

Mills was not heard from after his apologetic letter of April 27, '50 (Ex. 15) until his letter of Jan. 31, '51 (Ex. 18). There were no answers to appellants' letters of Sept. 13, '50 (Ex. 16) and Jan. 25, '51 (Ex. 17). Mills never did anything to terminate appellants' interest in the contract

other than send the letter postmarked Jan. 31, '51 (Ex. 18) (Dep. 49) nor did he ever intend to pay appellants back their money (Dep. 61-62).

II. (4) The following *Tenders under Contract* were made by appellants to keep their contract alive and support their claim for specific performance:

(a) After appellants promise on Jan. 25, '51 (Ex. 17) to continue payment to Mills, appellants by letter dated Feb. 4, '51, mailed Feb. 5, '51, sent a check for a \$25 payment (Ex. 17, 19, 20, 102-B) (Tr. 82). This was before they received Mills' cancellation letter (Ex. 18) (Dep. 60). The check was dated Feb. 5, '51 (Ex. 20-A) and was returned by Mills without a letter of transmittal in an envelope postmarked Feb. 7, '51 (Ex. 20). Found by the Court (Tr. 56).

(b) A second tender was admittedly made orally in August or September '53 when appellants discovered the destruction to their property and offered to pay "the balance on the contract" (Dep. 61). Mills refused the offer unless appellants paid him an additional \$1,200 (Tr. 92; Mills Dep. 61). This sum was in excess of the amount due. This tender was never mentioned by the Court.

(c) A third tender was made by appellants through their attorney, John Hathaway, on Aug. 26, '53, by tendering a check for \$675 (Tr. 95) and enclosing a form of deed acceptable to appellants (Ex. 21, 21-A, 21-B). This was returned by Mills' attorney, Winslow, with a letter (Ex. 22) on Aug. 31, '53. Exhibit 22 was the only answer to any of appellants' tenders. Appellants claim the amount of all tenders were in excess of the amount due because of

damage to the property. This tender found by the Court (Tr. 57).

(d) The fourth and last tender was the deposit in the District Court register of \$925 when the complaint was filed Dec. 18, '53. This tender found by the Court (Tr. 57, 58).

All tenders were unconditional and rejected without citing any reason except attorney Winslow's letter of August 1953 (Ex. 22) which was directed to the third tender only.

II. (5) *Destruction of Contract Property*: A stipulation as to the facts of the transaction concerning the timber is set forth in Tr. pp. 8 to 12. While Ex. 1 remained unsatisfied of record, on Dec. 7, '51 Mills delivered a "receipt" to Ray Douglas on payment of \$1,500, stating they "hereby sell" all the timber on Lot 8 (Ex. 26). On Dec. 8th Ray Douglas signed a similar "receipt" for said timber to Sigmund Wendling. On Mar. 5, '52, Wendling delivered a timber deed to the Publishers' Paper Company in an effort to sell them said timber, reciting that he was the lawful owner, the timber was free from encumbrances and he would warrant and defend the title (Ex. 28). At no time after Wendling took his "receipt" from Douglas did he ever procure a deed or bill of sale for the timber (Tr. 8). On Mar. 13, '52, the law firm of Koerner, Young, McColloch & Dezendorf wrote Publishers' Paper Company that Wendling did not have title and advised their client how to perfect title (Ex. 29) and rejected Wendling's offer (Tr. 10). Wendling received this letter and held it in his files and told no one

of it. May 5, '52, Wendling knowing he had no title to the timber, made an agreement with the Publishers' Paper Company to deliver 400 M feet of spruce and hemlock at \$31 per thousand for grades 2 and 3 and other grades at market price (Ex. 30). He did not specify where he would get the timber, but testified it was from Lot 8 (Dep.....). June '52, Wendling made an agreement with C. K. Warren (Ex. 31) in which Warren contracted to buy said timber and promised to pay Publishers' Paper Co. \$1,500 out of the proceeds. All logs were to be delivered to Publishers. Warren instructed Lyle Simmons to cut and he did cut some of the timber (oral agreement). May 24 to 31, '52, Warren had Oscar Tittle cut a logging road through the property (oral agreement). July '52, Warren made a written contract with George Hodgdon to log the timber on Lot 8 and he agreed to pay stumpage in the amount of \$1,500. This operation was under a partnership agreement (Ex. 33). Dec. 11, '52, Warren got an agreement from the Mills, extending the time to take off standing and down timber from Lot 8. On Dec. 12, '52, Warren assigned all his right to Loran D. Harveston (Ex. 35).

The above shows the parties, the exhibits (except the oral contracts), show the arrangements and the testimony of all parties show the loss and damage to Lot 8. (Ex. 36 is the highway map from which Ex. 37 (Earl Marshall's survey and map of Lot 8) is made; Ex. 38 gives the stump cruise of hemlock and spruce by W. M. Dockery showing the removal of 321,750 board feet and Ex. 38-A is Dockery's cruise of standing timber, showing 102,000 board feet left. This total shows an excess over Wend-

ling's contract to deliver 400 M feet to Publishers (Ex. 30). Ex. 29 shows the Publishers' Paper Company's accounting of logs received from Hodgdon and Warren totaling 212,720 feet, sold for \$7,145.89. Ex. 40 shows the accounting of the Columbia Paper Mills and Ex. 41 shows pictures taken by appellants disclosing the condition of parts of the property after logging had been effected. Those who cut timber from Lot 8 never had a conveyance of the timber from anyone. They made no search of title and neither Mills nor Wendling, who was a logger, would cut any of the timber themselves. This destruction was first known to appellants in August '53 (Tr. 88, 90, 91).

III. SPECIFICATIONS OF TRIAL COURT'S ERRORS: The trial court made, among others, the following errors respecting its Findings:

1. Failure to find and decree the true contract by omitting parts of the contract to which the parties had agreed and performed.

2. Quoting and relying on a forfeiture clause of Ex. 1 without giving effect to Ex. 2 and 6 by which the forfeiture clause was waived (Tr. 54).

3. Citing failures to make installment payments in some months during the years 1948, '49 and '50 and implying thereby that appellants breached the contract and the Court's failing to give effect to Mills letters (Ex. 2 and 6) (Tr. 15) adopted by the Court (Tr. 55).

4. Stating "the contract had been cancelled on Jan. 1, '51 for failure to make necessary installment payments or pay the taxes" (Tr. 55-6) when no notice of rehabili-

tation of the provision, if possible, or any threatened cancellation had been sent prior to Jan. 30, '51 (Ex. 18), nor were taxes to be paid to Mills except in the balance payable under the contract (Ex. 2) and when the appellants were not short of money (Ex. 6). The Court made this finding on taxes in the face of a stipulation by the parties that taxes were under Ex. 2 to be paid by Mills and included in the unpaid balance on the contract (Tr. 8).

5. Failing to find there were legal and sufficient explanation why installment payments were not made and that non-payment was excused by contract; also that time essence provision of Ex. 1 was modified and no notice reasonable or otherwise given to effect its reestablishment (Ex. 2, 4, 5, 6, 7 and 19).

6. Making no findings of fact as to trespass, destruction of appellants' property or damages, but making recitals of narrative facts from which no conclusions were drawn (Findings V, VI and VII; Tr. 56-57).

7. Erroneously finding appellants had abandoned the contract and equitable title without finding any fact which would conclude abandonment. In its findings of abandonment, the Court states a legal conclusion but finds no facts upon which abandonment could be based (Finding IX, Tr. 58).

8. Failing to find appellants had made timely and effectual tenders and that appellees had not done so.

9. Failing to find a confederation among appellees for the unlawful purpose of cutting and removing timber.

10. Failing to award damages for loss and damage to appellants' property and doubling the same and awarding of reduction in purchase price.

Among the Court's errors in the Conclusions of Law are these:

1. Giving any legal effect to the forfeiture clause of Ex. 1 (Tr. 58) because the same has been cancelled by the terms and effect of Exhibits 2 and 6 and the practice of the parties.

2. Failure to recognize and refuse to give any legal effect to Mills letters, Ex. 2 and 6, wherein Mills had authorized and approved the omission of payments, and erroneously reinstating the alleged forfeiture authority without any act of Mills even endeavoring to reinstate the same and based on that error declaring the contract null and void (Tr. 58-9).

3. Concluding the appellants had to communicate with Mills (Tr. 59) when there was no obligation to do so, either alleged or proven, upon which to base such alleged failure and when the evidence proved communications that were made were unanswered by Mills (Ex. 16, 17).

4. Concluding there were no tenders (Tr. 59) when there were four of them.

5. Concluding there was an abandonment of title (Tr. 59) without any finding of fact upon which to base the conclusion.

6. Failure to conclude the appellants were entitled to specific performance.

7. Failure to conclude that there was an unlawful conspiracy to commit a trespass and removal of timber.

8. Failure to conclude the appellants were entitled to damages.

IV. ARGUMENT ON TRIAL COURT'S ERRORS.

(1) The contract was made up of Ex. 1 and two succeeding letters, Ex. 2 and 6. A contract can be created by correspondence. *Shaw Wholesale Co. v. Hackbarth*, 102 Or. 80, 83. It is a judicial function to construe the writings disclosed by the record, namely, the letters heretofore set forth. *Yreka Lbr. Co. v. Lystul-Stuveland Lbr. Co.*, 99 Or. 291, 296. The trial court erroneously failed to decree when vendees missed April, October and November '46 installments, that Mills did "not follow the contract" (Ex. 2); that be brought into existence a new contract concerning the payment of interest and taxes, and when he wrote Ex. 6 he eliminated its time-essence element. *Johnson v. Berns*, 111 Or. 165, 173. By Ex. 2 Mills authorized appellants to pay \$25 per month and include in that installment payment of interest and taxes. By Ex. 6 he authorized appellants to "skip" installments when they were "short" of money. The intention of the parties and their acts formed a new meeting of minds and agreement, and the terms of Ex. 1 in conflict therewith were nullified. They could be rehabilitated only by certain procedure dictated by law (IV (3)).

The only difference between Exhibits 2 and 6 in contractual relations was that Ex. 2 was ratified and Ex. 6 was given prior authorization, both were followed by performance (Tr. 76; Ex. 24, 25, 16, 17, 20-A). The con-

struction to be placed by the Court on their prior performance has been declared many times. A typical case is *Miles v. S. P. & S. Ry. Co.*, 176 Or. 118, 125:

“ * * * There is no more certain way of finding out what the contracting parties meant than to ascertain what they have actually done in carrying out the contract. By so doing we learn what construction the parties themselves have placed upon the terms of their stipulation.’ ”

Therefore, the trial court erred by refusing to decree the *existence of a full contract* composed of three writings made by the parties and solidified by their agreeable performance for two and a half years (Tr. 76-77; Ex. 24, 25); also by arbitrarily selecting a part only of one instrument (Ex. 2) and entirely ignoring the other part of Ex. 2 and all of Exhibit 6. Appellants relied on these letters and were never told anything different orally or in writing (Tr. 77). Neither did Mills make any demands for installment payments orally or in writing (Tr. 78). There was no change, the same course was always pursued (Tr. 81). There is no record of said Court giving legal consideration to these last named integral parts of the contract.

“ * * * The court has no authority to read into said contract any provision which does not appear therein, *nor to read out of it any portion thereof.*” (Italics ours). *City of Reedsport v. Hubbard*, 202 Or. 370, 385, the only authority cited by the trial court; *Scheuerman v. Mathison*, 74 Or. 40, 48-49; 17 C.J.S. §296, p. 702. In *Fendall v. Miller*, 99 Or. 610, 617, the court said: “Every word or clause in a written instrument is to be given its full effect if possible to do so.”

Ex. 1, 2 and 6 include all the elements of a contract. *Shaw Wholesale Co. v. Hackbarth*, 102 Or. 80, 92; *Johnson v. Berns*, 111 Or. 165, 173. The parties made Ex. 2 and 6 parts of their contract. They were material parts. To ignore them was highly prejudicial. Failure to construe and enforce them made the difference between default and performance.

IV. (2) The trial court *erred in finding vendees breached their contract* (Finding IV, Tr. 55-6). This error grows out of its error in failing to find and give effect to all parts of the contract.

(a) The trial court found a breach on Jan. 30, '51 because no payments had been made for seven months (Tr. 55; Find. IV). But Mills had told appellants they need not pay when they were "short" of money. Appellants told Mills twice (Ex. 16 and 17) they were short and he made no objection until after he was advised on Jan. 25, '51 that payments would be resumed (Ex. 16, 17). Supporting these Exhibits, Mrs. Plastino describes the conditions under which they were written (Tr. 86-87).

(b) The trial court also found as a breach the failure to pay taxes (Tr. 55-6). It gives no effect whatever to the terms of Ex. 2 but the parties did include taxes in the balance to be paid when appellants were able (Ex. 6).

A finding can not be legally made on part of the facts. The omission was called to said court's attention (Obj. p. 3, Par. III).

Mills gave no notice of a change of performance after Aug. '48 (Tr. 81). The parties both pursued the original

methods Mr. Mills suggested (Tr. 81). For all appellants knew the same arrangements and their performance as heretofore made still prevailed. Mills is estopped by statements and conduct from claiming anything different.

Appellants' confidence in Mills' promises is shown by letters Ex. 16, 17. If Mills did not accept their explanations, it was his duty to speak.

Without repetition, there are other allied matters preventing the trial court's finding of appellants' alleged breach. (See "Failure to find full Contract", p. 13) ("Tender", p. 16), ("Waiver" of penalties, p. 20) ("Vendors' Breach", p. 21), (Failure of Vendors' alleged Cancellation, p. 24), (No Abandonment, p. 22).

Based on the above facts and law, the trial court's findings of failure to make "monthly payments" (Find. IV; Tr. 55) and its conclusions (I and III; Tr. 58-9) are erroneous.

(c) The trial court mentions only three of the appellants' four *tenders*:

(i) Their first tender was good (Ex. 19, 20-A). They mailed their \$25 check on Feb. 5, '51. They received Mills' cancellation letter postmarked Jan. 31, '51 on Feb. 7, '51 (Tr. 81). If the "cancellation" letter was ineffectual, as appellants claim (See IV (7) p. 24) neither the date of receipt nor the letter itself is material. Appellants' tender was effective because: (1) It complied with O.C.L.A. 72-101, ORS 81.010. If Mills had objections, he had to specify them or all objections are waived. Mills made no objections. He is now precluded from making any. O.C.L.A.

72-103, ORS 81.020. He simply returned the check (Ex. 20, 20-A). (2) Mills' letter (Ex. 18) being ineffectual in law, Mills had no right to refuse the tender, and on refusal he breached his contract (IV (5) p. 21).

This tender and its "positive and absolute refusal" made all further tenders unnecessary: since (1) the law did not require appellants to do a "vain and useless act". *Shaw Wholesale Co. v. Hackbarth*, 102 Or. 80, 91; *Whitney Co., Ltd. v. Smith*, 63 Or. 187, 191; (2) condition precedent to appellants' right to ask the court for specific performance. *West v. Wash. Ry. Co.*, 49 Or. 436, 449. This tender had another effect fatal to Mills' claims and his affirmative defense of "Abandonment" (p. 22).

After appellants had received Mills' "Cancellation" letter (Ex. 18) on Feb. 7th, they did not communicate with him. But when they received back (Ex. 20) their check for the installment payment (Ex. 20-A) on Feb. 7, '51, they saw their Seattle attorney who advised: "When a man sends you back a check and tells you he is going to foreclose, your move is not the next one; it is his, and you wait until you get a notice of foreclosure, and you have your check ready to tender to your attorney" (Tr. 94).

(ii) Appellants made two other tenders. One was their oral offer in August '51 to pay "the balance on the contract" which is admitted by Mills (Dep. 61) and rejected by him when he demanded an additional \$1,200 (Mills' Dep. 61; Tr. 92).

(iii) The third and fourth tenders have been described (Statement, p. 7). The deposit in court awaits the

disposition of this Court, as indicted in *Equitable Life Assur. Soc. v. Boothe*, 160 Or. 679, 683.

IV. (3) Assuming (contrary to fact) that Ex. 1 (containing the only penalty clause) was alone the contract, appellants prove any *breach of the contract was waived* and thereafter the *law required notice of a reasonable time to make payments*, before the penalty clause, if any remained, could be invoked.

It is reasonable to assume Mills knew the forfeiture clause was not self-executing, and therefore he had to send his cancellation letter (Ex. 18). But whether he knew it or not, the law in such a case as this allows forfeiture only after notice and the allowance of a reasonable period to comply with the demand. No notice was ever sent. This fact alone is fatal to Mills' claim of right of forfeiture. The courts place great emphasis upon this notice of rehabilitation. It is recognized by the following authorities:

The trial court announced this legal principle which is fatal to Mills' case (Tr. 86-7). Why it was not again referred to or followed, is not known to appellants.

Grider v. Turnbow, 162 Or. 622, 640, quotes from *Epplott v. Empire Investment Co.*, 99 Or. 533, 541:

“ ‘Since contracts like the one here are not self-executing, the law by implication introduces into such contracts a provision that the right of forfeiture should be exercised only after first giving notice for a reasonable period of time, or rather, speaking figuratively, the invisible and omnipresent hand of the law writes such a provision into the contract; and, therefore, the right to forfeiture can not be fully exercised unless: (1) the vendor gives reasonable notice; and (2) the purchaser fails to pay within the time fixed by the notice.’ ” Also

"The clause in the contract providing that time shall be of the essence thereof is for the benefit of the vendor, and it may be waived by him. The waiver may be effected by the acceptance of payments past due without insisting upon punctuality. When once waived, the provision for forfeiture is of no avail to the vendor unless he first gives to the purchaser reasonable notice of his intention in the future to insist upon strict performance on his part of the terms of the contract. This rule of law is so well established that no citation of authority is necessary to support it." (162 Or. 622, 641)

Norton v. Van Voorst, 191 Or. 577, 585; *Smith v. Carleton*, 185 Or. 672, 682; *Gray v. Pelton*, 67 Or. 239, 244.

IV. (3) (a) Mills' acts described in Ex. 2, 6 and 25 were within the legal definition of "*Waiver*", i.e.: "an intentional relinquishment of a known right." This includes *knowledge* of the existence of the right and an *intention* to relinquish it. *Johnson v. Feskens*, 146 Or. 657; *Mathers v. Wentworth & Irwin, Inc.*, 145 Or. 668; *Smith v. Martin*, 94 Or. 132, 138; *Propst v. William Hanley Co.*, 94 Or. 397, 402.

Up to Nov. 29, '46, Mills had the optional right to either declare the contract void *and strictly foreclose* (the declaration alone was *not sufficient* under the contract terms); or he could accept delayed payments and continue the contract. As the courses were inconsistent, he could not do both. *Rynhart v. Welch*, 156 Or. 48, 53. He chose the latter and thereby waived the right to rescind. *Johnson v. Feskin*, 146 Or. 657; *Miller v. Beck*, 72 Or. 140, 142. Waiver is inferred whenever vendors' conduct

is inconsistent with their enforcing forfeiture. *Geroy v. Upper and Knight v. Barry*, 182 Or. 535, 542.

“Waiver” and “Estoppel” are not different terms in this case. They mean the same thing. Either or both apply to Mills’ statements and conduct toward appellants. The principles are mingled into one another to prevent an unjust result. *Smith v. Martin*, 94 Or. 132, 142; *Kimball v. Horticultural Fire Relief*, 79 Or. 133.

IV. (4) The trial court sought to invoke the waived *forfeiture clause* of Ex. 1. The simple clause is quoted four times (Tr. 46, 52, 54, 48). When Mills by his letter (Ex. 2, Nov. 29, ’46) released appellants from making payments of interest and taxes in addition to the \$25 installment, and by Ex. 6, Aug. 16, ’48, released appellants from making monthly installments when they were “short” of money, he released that much of performance required of the appellants by Ex. 1, and the “failures” described in Finding IV (Tr. 55, 81). When he authorized “skipping” payments he nullified the time-essence terms. When appellants did not violate any terms of their contract, there were no grounds for forfeiture.

The much quoted forfeiture clause related to “any provisions hereof” and referring to Ex. 1. It did not relate to letters not then in existence, such as Ex. 2 and 6. Even by wishful thinking the forfeiture provision could not apply to the new terms contained in Ex. 2 and 6 made approximately a year and more later. The record is totally void of any intention of any of the parties to apply the forfeiture clause of Ex. 1 to either Ex. 2 or 6.

Forfeiture is a harsh way of terminating contracts. If Mills insists upon it, he must establish such right by clear and convincing proof. *Share v. Williams* (Ore. 1954) 277 P. 2d 775, 780; *Stennick v. J. K. Lumber Co.*, 85 Or. 444, 475. But Mills at no time indicated appellants' contract, as modified, was not in the same status as it was when he theretofore accepted late payments (Tr. 79).

To allow a forfeiture in this case would violate the principles declared in *Zumstein v. Stockton*, 199 Or. 633, 639; *Johnson v. Feskens*, 146 Or. 657, 661.

This point was squarely before the trial court (Tr. 16).

IV. (5) The trial court erred in not decreeing the vendors *had breached their contract* (See "Statement" II (3). Mills rely on their "cancellation" (Ex. 18) to support their rejection of the Feb. 5, '51 tender. (See "Tender", p. 16). If the cancellation was a nullity (Cancellation, p. 24), the modified contract still prevailed and Mills' breach is based on his unequivocal refusal of performance (Ex. 19, 20, 20-A).

Notice required by law might have been given before or after payment (Ex. 20) by "* * * fixing a reasonable time within which payment might be required; but the rights of the purchaser under a contract not absolutely terminated cannot be extinguished by a summary declaration of forfeiture." *Higenbotham v. Frock*, 48 Or. 129, 131. The "positive and absolute refusal by one party (Mills) to carry out the contract is in itself an immediate complete breach of it on his part, and gives immediate right of action." (Ex. 18). *Shaw Wholesale Co. v. Hackbarth*, 102 Or. 80, 90.

IV. (6) The trial court erroneously found that appellants had *abandoned* their “unperfected equitable title” (Find. IX; Tr. 58) and concluded to the same effect ((II, Tr. 59). The idea originated in the letter of Mills’ attorney (Ex. 22) referring to the contract. Later it was applied by the Court to the estate. Abandonment is defined as follows:

“It has often been held that to constitute an abandonment there must be an intention to abandon, and that intention must be accompanied by some act by which the property is actually abandoned. * * * It is an affirmative defense and to succeed, the intent may be derived from all the facts and circumstances of the case, but there must be a clear, unequivocal and decisive act of the party to constitute abandonment in respect of a right secured—an act done which shows a determination in the individual not to have a benefit which is designed for him.” *Dober v. Ukase Inv. Co.*, 139 Or. 626, 629.

The trial court pinpoints the date of abandonment as the week between Jan. 30, '51 (Ex. 18) and Feb. 7, '51 (Ex. 20) (Find. IX, Tr. 58) and its basis as “failure” (1) “of plaintiffs (appellants) to communicate with defendant Estber Mills” (Op. Tr. 52), and (2) “to tender the amount due for a period of more than two years after their \$25.00 check was returned to them.” (Tr. 52) (See “Tender”, IV (2) (c) p. 16).

The inadequacy of the evidence to prove abandonment is disclosed by the following: There is no evidence between Jan. 30 and Feb. 7, '51 (or any other time) of any *intent* or *act* to abandon appellants’ property. At that time the evidence shows appellants immediately procured legal advice as to the course to pursue (Tr. 94-5).

The trial court's basis for abandonment is "failure" which is the negation of required action. Abandonment is based on a voluntary relinquishment disclosed by "clear, unequivocal and decisive acts" which "constituted a virtual, intentional throwing away." *Hull v. Clemens*, 200 Or. 533, 547. Appellants had no duty to "communicate" with Mills because of Mills' breach of contract (IV (5) supra). After Mills' unconditional refusal to perform the contract by returning the payment, the law did not require appellants to do a "vain and useless act" by "communicating" with Mills. *Whitney, Ltd. v. Smith*, 63 Or. 187, 191.

The same principle applies to the court's erroneous requirement of further tender. The \$25 tender was rejected in Feb. '51. It was unnecessary to make the three other tenders rejected subsequently. On what evidence can the Court say a tender between Feb. '51 and Aug. '53 would have been successful or required?

"Abandonment" is not presumed from lapse of time. "An intention to abandon property for which a party has paid a consideration will not be presumed. * * * The burden of showing an abandonment rests on the one who asserts it." *Dober v. Ukase Inv. Co.*, 139 Or. 626, 629.

The trial court found "plaintiffs abandoned their unperfected equitable title" (Find. IX, Tr. 58). Such is a conclusion of law. There are no facts upon which a "finding" can be based. Therefore the Conclusion (II, Tr. 59) is a nullity. The trial court should have found from the evidence, if possible, facts disclosing an *intent* to abandon, either expressed or implied, and a "clear, unequivocal and

decisive" act which carried the intent into effect. Assuming contrary to fact, that proof of abandonment existed, the trial court made no Finding thereon, consequently there was nothing to support its conclusion, and nothing on which to base its judgment. *Darling v. Miles*, 57 Or. 593, 596.

IV. (7) Mills' letter (Ex. 18) was ineffectual as a *cancellation* of either appellants' contract for deed or their equitable estate.

"Cancellation" necessitates an *intent* and a *concurrent act*. *Yont v. Eads*, 57 N.E. 2d 531, 532. The *act* must be one of surrender manifesting the *intention* to cancel. *Hickox v. Hickox*, 151 S.W. 2d 913, 917-8.

Mills' letter mailed *Jan. 31*, showed the *only intent* to be one of cancellation on *Jan. 1*. But there was no *act* on Jan. 1. The terms of the letter do not allow interpretation that he *intended* to cancel Jan. 31, '51, the date he mailed the letter or that he *intended* the letter to act as notice of default and demand for payment. There is no such wording. The trial court had no power to read into Mills' letter anything Mills did not say, or to find *intent* and *act* concurrent when they were not. ORS 174.010; *City of Reedsport v. Hubbard*, 202 Or. 370, 385; *Scheuerman v. Mathison*, 74 Or. 40, 48-9.

The letter can not be construed as "reasonable notice" (IV (3)) because no time was allowed for performance. He testified he did not know why he sent it (Dep. 50). But it seems obvious he wanted to prevent appellants making their payment (Ex. 20-A) previously promised (Ex. 17).

IV. (8) The trial court makes extended recitals in its opinion (Tr. 46-53) and findings (Tr. 53-58) on confederacy of appellees which resulted in substantial loss to appellants. But it draws no conclusions therefrom nor passes judgment thereon. The error appellants present is a lack of consideration and conclusion by the trial court of a serious claim for damages caused by the joint action of individuals engaged in an unlawful purpose. This matter was before the court, as conclusively shown by the pre-trial order (Tr. 5-6, 8-12, 19-24).

Without repetition, the confederacy or conspiracy (nomenclature is not an issue) is shown herein (II (5)), by depositions (Ex. 50-54), the reporter's transcript, consolidated testimony in the pretrial order (Tr. 5-6, 8-12) and the section herein on "Unclean Hands" (p. 30).

The trial court briefly commented on "confederacy" and "conspiracy" (Tr. 50, 58) but what it was actually told is disclosed by the following quotations delivered in appellants' trial brief:

"(1) *Definitions: Confederacy* (P.O. pp. 16, 21, 25). Defendants' acts come within the definition of confederacy: 'An act of confederacy is when two or more persons combine together to do any damage or injury to another or to do an unlawful act.' *Watson v. Harlem & N. Y. Nav. Co.*, 52 How. Prac. 348, 353.

"*Conspiracy* has been defined as: '* * * a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal by unlawful means.' (Italics ours). *Pitts v. King et al.*, 141 Or. 23, 28; 12 C.J. 540, §1; *State v. Goodloe*, 144 Or. 193, 196. * * *

“*Joint tort feasons* are where ‘different persons owe the same duty and their acts naturally tend to the same breach of that duty, the wrong may be regarded as joint and both may be held liable.’ 62 C.J. 1130, §44.

“‘The rule is well settled that joint liability exists where the wrong is done by concert of action and common intent and purpose, provided that the act of each person was an efficient cause contributing to the in jury. Proof of a conspiracy is not necessary.’ 62 C.J. 1135, §47. * * * All are liable for the acts of another in the scope of the joint enterprise. *Shaw v. Moon*, 117 Or. 558, 564. * * *

“It is not necessary that the charge of conspiracy be established by direct and positive evidence. *Rouse v. Equitable S. & L. Ass’n.*, 151 Or. 427, 435. In the present case the proof, however, is almost entirely documentary evidence.

“The allegations of confederacy or conspiracy are important only in order to cement the various defendants into the transaction by which plaintiffs were damaged and to charge them with the acts and declarations of each other as co-conspirators. *Gabriel v. Collier*, 146 Or. 247, 255.

“The actual facts of conspiracy may be inferred from circumstances. *State v. Hyde* (Civil) 88 Or. 1, 33. The concurring conduct of the defendants need not be directly proved. *Wilson v. McCarthy*, 66 Or. 498, 501.

“While circumstantial evidence is sufficient to establish the conspiracy, herein is direct evidence pointing unmistakably to the conclusion that each defendant had a part in the chain of proximate cause by which the plaintiffs lost part of their estate. The basic action of defendants on which liability is predicated is documentary. To prove their authority, these defendants voluntarily produced and delivered their contracts and assignments. Other documentary proof,

such as 'Receipts', proposed deed and legal opinion of title failure, were procured from other parties. All these showed a common purpose to acquire and for various reasons pass on to another or other defendants the presumptive privilege of removing timber or logs from Lot 8. While not essential, the cementing of these relations was based on monetary valuations in each defendant. Mills received \$1,500 from Douglas; Douglas had the continued trade of Wendling in his beer tavern which apparently was worth more than the \$100 offered by Wendling and refused by Douglas; Wendling received \$1,500 from Publishers' Paper Company through Warren (Ex. 32) (Wendling's Dep. 62); Warren received \$225.00 from Harveston (P.O. p. 17); Tittle received \$315.00 from Warren (P.O. p. 17); Simmons received from Hodgdon \$400.00 (P.O. p. 16); Hodgdon got at least \$2,700 from Publishers, \$1,500 of which was given him by Wendling and Warren (Ex. 32); and Hodgdon and Warren received together something like \$7,145.89 from Publishers (Ex. 39). Harveston did not have time to work out his investment. * * *

"Defendants had notice of plaintiffs' estate at least on and after April 11, 1950 (Ex. 23) and before any of them became involved. Defendants' concerted action began not earlier than December 7, 1951 (Ex. 26) and the destruction of plaintiff's estate occurred between July of 1952 and December 1953, and all these acts were aimed at a single result,—the trespass and conversion of timber on Lot 8, and accrued to defendants' respective use and benefits, directly or indirectly. It has long been held that such wrongful acts may be counted upon collectively as the destruction of one's property in an *action on the case*. *Cash v. Garrison*, 81 Or. 135, 139. This case involved a long series of various acts and delinquencies and took on the aspect of various causes of action *ex contractu* and in tort, culminating in the wrecking of plaintiffs' business for the benefit of defendants, against whom judgment was entered. An action on the case

is in the nature of a conspiracy and judgment may be entered against joint defendants with proof of conspiracy. *Condit v. Bodding et al.*, 147 Or. 299, 328.

“Whatever the nomenclature here used may be, the facts are all before this Court. In such case the Court said: ‘* * * we see neither reason nor justice under our modern system of pleading in denying him (the plaintiff) that right simply because of a theoretical distinction not always easy to perceive, between a direct and consequential injury.’ *Kunnhausen v. Stadleman*, 174 Or. 290, 299.

“In this case the overt act consummating conspiracy is the cutting of timber, and the acts so done result in damage to the plaintiff (12 C.J. p. 581, §100). That damage must be the natural and proximate results of the defendants’ acts. 12 C.J. 582, §100.

“*Proof of Conspiracy*: The order for receipt of testimony is largely in the discretion of the trial court. Conspiracy may be implied from circumstances and the concurring conduct of the defendants need not be directly proven. *State v. Lewis*, 51 Or. 467, 469.

“*Effective Conspiracy*: Each conspirator is bound by the acts and declarations of his associates while engaged in the furtherance of the common design, although the conspirator may be unaware of the identity of his co-conspirator actually performing the act or uttering the declaration. O.C.L.A. §2-228 (6); O.R.S. 41.900; *State v. Boloff*, 138 Or. 568, 593.”

If conspiracy were not proven, appellants could recover from those guilty of the tort. *Howland v. Corn*, 232 F. 35, 40.

The appellees were made parties for two purposes: to collect damages from those who were liable and to quiet title against those who must have asserted some title to have so dealt with appellants’ property.

IV. (9) The extent of *timber damage* is shown by appellants' cruise, the only one offered by any party. This showed 321,750 board feet (Tr. 65) of good quality, cut from Lot 8—100,140 feet of spruce and 221,610 feet of hemlock (Tr. 66). There was left standing as the subject of severance damage 102,00 board feet of which 75,000 was spruce and 27,000 was hemlock (Ex. 38, 38-A) (Tr. 66). There is corroboration in Ex. 39, 40. The condition of the property after logging is shown by rainy day snapshots (Tr. 92, 83; Ex. 41).

Using Marshall's maps (Ex. 36, 37; Tr. 67) and checking Dockery's cruise (Ex. 38, 38-A; Tr. 68, 71-2), W. Henry Thomas, admittedly qualified (Tr. 21-2), testified the fair market value of the timber on Lot 8 in June 1952 (Tr. 69) (when logging started Tr. 68) was \$3,049.61 (Tr. 68). The fair market value of timber removed was \$2,437 and of the remnant standing \$612 (Tr. 70). *O & C Rd. Co. v. Jackson*, 21 Or. 360, 363; 15 Am. Jur. p. 513, §106.

The law contemplates that injury to the freehold may occur separate from the value of the timber, and the measure of that damage is determined by the difference in the value of the land immediately before and after the consummation of the wrongful act. *Moss v. Peoples Calif. Hydro-Electric Co.*, 134 Or. 227, 231. One witness whom the trial court rather arbitrarily dismissed fixed this difference at \$3,000 (Tr. 73). Two others fixed the value before removal of timber at between \$3,200 and \$3,500 (Tr. 110) and thereafter reduced 75% (Tr. 110) in June '52 (Tr. 109). Witness Kerr—\$3,400 (Tr. 115) as against the June value of \$1,200 (Tr. 117). Such damage is recoverable.

Hanns v. Friedly, 181 Or. 631, 642; *Huber v. Portland G & C Co.*, 128 Or. 363, 367.

No logger of Lot 8 cleared the slashings, but left them to constitute a fire hazard (Tr. 66, 69, 73; Ex. 48, 49). Damage in the form of clearance is \$350 to \$400 (Tr. 69).

(a) The value of timber unlawfully removed is (without any counter valuation) fixed by Engineer Thomas as \$2,437 (Tr. 70). This should be doubled (ORS 105.815) or trebled (ORS 105.810). At least the doubling would be a boon to these long suffering appellants. Between the trial in May '54 and the decision on Mar. 18, '55, two important cases affecting appellants' rights were decided, the *Reedsport* case 202 Or. 370 which was the only authority cited by the court and the other is *Kinsula Lbr. Co. v. Daggert*, 281 P. 2d 221, 225. Appellants request the appellate court consider their cause as meriting the application of the principles of the *Kinzula* case. *Erie R. Co. v. Thompkins*, 304 U.S. 64, 77; 82 L. ed. 1188.

(b) Appellants' acreage of 43.46 "acres more or less" (Ex. 1) is reduced by 8.72 acres (Tr. 64; Ex. 37). At the purchase price of \$36 per acre, the reduction amounts to \$324. *Whitney Co., Ltd. v. Smith*, 63 Or. 187, 192, authorizes a *pro tanto* performance and reduction in purchase price sufficient to cover the deficiency. *Thompson v. Hawley*, 16 Or. 251, 255.

IV. (10) "*Unclean Hands*": Deception, fraud and unfair practices permeated this entire logging operation. The following pinpoints some of the culpability:

Mills was the fountain of iniquity. He had a recorded contract of sale of Lot 8 outstanding (Tr. 7; Dep. 13);

he told no one of it (Dep. 55); he misrepresented the tax liability of appellants and tried to lay it on innocent girls in the sheriff's office, he knew the tax statement which he sent to appellants was false; he took the "blame" (Ex. 15); he never made any response to this overcharge except to write "so what?" (Ex. 15; Dep. 38); he attempted to forfeit appellants' equity in a manner repugnant to the trial court (Tr. 51); his testimony seems controlled by his interests rather than his integrity; he executed the first "receipt" (Ex. 26) which totally lacked words of conveyance. O.C.L.A. §70-101; ORS 93.010; *Lambert v. Smith*, 9 Or. 185, 191. It could not be given the effect of a conveyance unless it contained such words. *Capell v. Fogar*, 30 Mont. 507, 517. He testified his conscience did not hurt him when he charged "these kids" (the Hogans) \$1,575 for land which he swears at the time was worth but \$50 (Tr. 97) excusing himself on the basis: "if they come after you" (Tr. 97). He represented and sold 43.46 acres (Ex. 1) without knowing the amount was there (Dep. 14). He testified he did not change the terms of the contract (Dep. 15) but followed it (Dep. 16). His own record proves such statements false (Ex. 2, 6 and 25; Dep. 17, 18). Mills initiated the chain of causation on Dec. 7, '51 (Ex. 26) and assisted in its final unlawful stages in Dec. '52 (Ex. 34; Tr. 104).

Douglas procured and passed on the same type of "receipt"; was the conduit who made the whole illegal business possible, released the Pandora box of trouble, is not disassociated from Mills and Wendling whom he served. Lack of monetary compensation is not material (Ex. 26; Tr. 100-2).

Wendling is nefarious, a gypo logger (Tr. 19), started the deal (Tr. 8, 100-2); tried to sell by timber deed (Ex. 28) to Publishers' Paper Co. to whom he contracted to sell 400 M board feet of logs from Lot 8 (Tr. 9; Ex. 27). Publishers refused to buy and delivered to him a legal opinion from a reliable law firm that he had no title on Mar. 13, '52 (Ex. 29; Tr. 10). He admits a mistake he did not correct the title (Tr. of Proceed. 154), was a logger (Tr. 19), but did not log Lot 8 himself (Tr. 19), was not going to lose his \$1,500 so contracted on May 5, '52 (less than two months after he knew he had no title) to sell Publishers' Paper Co. 400 M feet of spruce and hemlock without telling them the logs came from the same Lot 8 (Ex. 30; Tr. 10, 98); he assisted in removing 250 M to 300 M feet (Tr. of Proceed. 140). By June '52 he hooked Warren to log Lot 8 (Ex. 31; Tr. 10, 103, 104), and required the sale be made to Publishers so that he had Publishers liable to him for his \$1,500 (Ex. 32) which he was finally paid (Tr. 11). In contracting with Warren (Ex. 31), he did not make the covenants that he had proposed in the timber deed (Ex. 28), showing his knowledge of lack of title and consequential fraud. When he saw he was in a "jam", all he wanted was his money back (Tr. 11). The activity of Warren is described in Tr. 10-11, 102-6, of Hodgdon in Tr. 11, and of Simmons in Tr. 107-8.

None of appellees secured title reports, made inquiry themselves as to the title to the timber, delivered any documents of conveyance, ran any lines, made any survey, claimed they kept no records (none were produced) and made no releases between themselves (Tr. 104). All had a common purpose of taking timber they did not own.

He who fails to inquire is chargeable with all facts which he might have ascertained on proper inquiry. *Musgrove v. Bonser*, 5 Or. 313, 317. Lyle Simmons said the job “stunk” (Tr. 107) and without authority their taking the timber was just the same as “stealing” because they “had no business there” (Tr. 108). This bit of integrity stands out like a “good deed in a naughty world”. All were guilty of patent misconduct.

Authorities are many that he who comes into equity and asks for relief must come with clean hands. *Saling v. First National Bank of Tillamook*, 93 Or. 237, 246. Otherwise those guilty of misconduct will not be relieved of the consequences of their wrong doing. *Blake v. Kimble*, 120 Or. 626, 630.

V. The trial court states that in *Hogans'* two admitted assignments to appellants (Ex. 1 and 23), the latter did not agree to assume the payments (Tr. 47, 55). If such statements are intended to indicate appellants lacked authority to protect their rights, it is both immaterial and incorrect.

In *Corvallis & Alsea River R. Co. v. Portland E & E Ry. Co.*, 84 Or. 524, 539, the court said: “* * * the assignment of a contract operates not merely as an assignment of the moneys thereafter to be earned, but of the whole contract with its obligations and burdens. After the same has been modified by the parties thereto, it is an assignment of the contract as modified.” Appellants were by assignment possessed of a right to sue. *Collins v. Heckart*, 127 Or. 34; ORS 80.010.

VI. The trial court did not decree specific performance because of two errors: (1) it did not decree the modified contract as performed by the parties and (2) it invoked the forfeiture penalties of the old contract which were specifically waived and nullified by the vendors' later agreements and were made ineffectual thereby.

Appellants submit that a contract has been established which will authorize a decree that the parties should specifically perform (Ex. 1, 2 and 6). The established contract belongs to a class capable of being enforced because it has requisite elements. 4 Pomeroy "Equity Jurisprudence" (5th Ed. 1941) p. 1024, §1399; p. 1033, §1401; p. 1034, §1402; pp. 1042 to 1053; ORS 93.020 (O.C.L.A. §2-906. While appellants have neither title nor possession, jurisdiction in such cases depends on whether the interest to be protected is equitable in its nature. An equity proceeding is generally invoked to obtain both. When an estate or interest is to be protected, equity takes jurisdiction for that purpose because, as herein, legal remedies are not possible nor adequate. Equity converts the equitable estate into a legal one and completes its remedy by awarding legal relief when it can do a more perfect and complete justice such as awarding damages. 4 Pomeroy, p. 1028. There are many Oregon cases to the above effect, including *Temple Enterprises, Inc. v. Combs*, 164 Or. 133, 158, which holds vendors may be required to perform so far as they are able.

Appellants submit their remedial right is perfect in equity as one wherein the court can exercise its "sound judicial discretion controlled by established principles of

equity and exercised upon a consideration of all the circumstances * * *." 4 Pomeroy p. 1040, §1404; *Goodyear Tire & Rubber Co. v. Mills*, 22 F. 2d 353.

Oregon statutes give a complete remedy and equity has concurrent jurisdiction with courts of law (ORS 11.-020) against all appellees (ORS 13.160) and the decree of this court shall be equivalent to a deed from the Mills (ORS 23.020; ORS 93.730).

The contract herein is established beyond the necessary preponderance of evidence and the conveyance may be decreed even though encumbered in a manner not originally contemplated and a perfection of title or its equivalent enforced by the decree itself. *West v. Wash. Ry Co.*, 49 Or. 436.

The equity court does not require appellants to bring a second or other suit at law because having acquired jurisdiction, it will do full justice even to decreeing a recovery of damages. *Walker v. Mackey et al.*, 197 Or. 197, 209; *Lockhart v. Ferrey*, 59 Or. 179, 185; *Temple Enterprises, Inc. v. Combs*, 164 Or. 133, 155.

VII. In conclusion, appellants ask the relief prayed for in their complaint.

Respectfully submitted,

ROBERT R. RANKIN,
Attorney for Appellants.

Dated: Portland, Oregon

November 4, 1955.

United States
COURT OF APPEALS
for the Ninth Circuit

MICHAEL R. PLASTINO and RUTH C. PLASTINO,
husband and wife,

Appellants,

vs.

ESTBER MILLS and EDNA MILLS, husband and
wife; RAY DOUGLAS and PAULINE DOUGLAS,
husband and wife; SIGMUND WENDLING and
DOROTHY WENDLING, husband and wife;
LORAN D. HARVESTON; LYLE SIMMONS;
GEORGE HODGDON; C. K. WARREN; and OS-
CAR TITTLE,

Appellees.

APPELLEES' BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

GEORGE P. WINSLOW,
WM. C. RALSTON,
IRVING RAND,

Attorneys for Appellees.



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JURISDICTION

We do not believe that the jurisdictional require-
ment of \$3000.00 in controversy has been met. This
point was raised by the defendants in the trial court by:

1. Denying the allegation in the complaint claiming
jurisdiction; and,

2. Motion to Dismiss for lack of jurisdiction (Second Defense); and,
3. It was also specified as a defendants' contention (Tr. 34).

The complaint generally contains two causes of action; one a suit for specific performance of the contract of November 7, 1945 against the defendants Estber Mills and his wife, and two, a claim for damages against the remaining defendants (except Oscar Tittle) claimed to have been incurred in the removal of timber on the premises sold under the contract of November 7, 1945.

At the time the action was instituted the said premises (Lot 8) were worth \$1200.00 according to the plaintiffs' evidence. The witness Richard D. Kerr so testified (Tr. 117). Another witness for the plaintiff, E. W. Ford, testified the premises were worth \$1000.00 (Tr. 73).

It is the value of the property at the commencement of the action (not the contract price) which establishes the amount in controversy. *Ebensberger v. Sinclair Refining Co.*, 165 Fed. 2d 803; *Johnson v. Trippe*, 33 Fed. 530; *Sinclair Refining Co. v. Miller*, 106 Fed. Sup. 881.

As to the trespass phase of the case, the complaint charged the defendants, Sigmund Wendling, C. K. Warren, Loran D. Harveston and George Hodgdon, with wilfully, without the plaintiffs' consent, cutting and carrying off timber from the plaintiffs' land thereby damaging them in the sum of \$3051.10. The charge in the complaint that said defendants so conspired with the defendant Estber Mills was not supported by evi-

dence. On the question of the amount of damages, the plaintiffs submitted evidence that the value of the timber removed from Lot 8 was \$2437.00. The witness W. Henry Thomas so testified (Tr. 70).

It is hardly necessary to point out to Your Honors that the jurisdiction of the District Court is not conferred by a pyramiding of damage claims. Assuming, but not admitting, that the plaintiffs were entitled to sue for specific performance, the only defendants in such a suit were Mr. Mills and his wife. On the other hand, in suing for damage for trespass and conversion the only proper defendants, of course, would be persons who actually trespassed and converted timber. It is an impossibility to put either Estber Mills or his wife in this category for the simple reason that they at all times held title in fee simple to Lot 8. We know of no legal leger de main by which a man may trespass on his own property.

Accordingly, since neither the suit for specific performance nor the claim for damages for trespass involved \$3000.00, the District Court did not have jurisdiction. *Sloane v. Kramer Bros. & Co.*, 230 Fed. 727. In this case, which was a suit to remove a cloud from title, it was held that the amount in controversy was the value of the land, title to which was directly attacked, and that damages also prayed for value of timber cut from the land should be considered incidental, and not calculable in fixing the jurisdictional amount.

Jurisdiction of the District Court was put in issue as before stated. It was therefore the duty and burden

of the plaintiffs to establish that the jurisdictional requirements had been met. This they failed to do, and are not properly in court. *KVOS v. Associated Press*, 299 U.S. 269, 81 L. Ed. 183. *McNutt v. GMAC*, 298 U.S. 190, 56 S. Ct. 780, 80 L. Ed. 1135. *Electro Therapy Products Corp. v. Strong* (CCA 9), 84 Fed. 2d 766.

In *KVOS v. Associated Press*, supra, the court said:

"Since the allegation as to amount in controversy was challenged in appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed. *McNutt v. General Motor Acceptance Corp.*, supra, p. 190. The Circuit Court of Appeals had jurisdiction of the appeal and as the District Court lacked jurisdiction its decree dismissing the bill should have been affirmed on that ground."

In *Electro Therapy Products Corp. v. Strong*, supra, the Ninth Circuit Court of Appeals held that it should determine whether the District Court had jurisdiction of the suit notwithstanding that question was not raised by the parties, saying:

"The District Court's jurisdiction is to be tested by the value of that right. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. , 56 S. Ct. 780, 80 L. Ed. , decided May 18, 1936. That value depends, of course, on the value of the inventions. The precise nature of the inventions cannot be ascertained from the record. The evidence shows that they have not been patented. There is no proof that they are patentable, or that their value, if any, exceeds \$3,000."

In suggesting that the District Court did not have jurisdiction we are not overlooking the extravagant claim of the plaintiff for treble damages "by authority of

statute in such case made and provided". No such statute was plead. ORS 105.810, upon which the plaintiffs apparently rely, permits treble damages for trespass to timber if "without lawful authority". The law presupposes that the plaintiff in such a case owns the premises trespassed upon. It would be a legal impossibility for the plaintiffs to recover treble damages against anyone in this case.

We conclude, therefore, by suggesting that the District Court did not have jurisdiction of the case because \$3,000.00 could not be claimed against any individual defendant.

STATEMENT OF THE CASE

The appellants' statement of the case is rather argumentative. For the convenience of Your Honors we submit the following:

This case involves the rights and obligations of various parties growing out of the contract of November 7, 1945 (Ex. 1), for the sale of 43 acres of land in Tillamook County, Oregon, by the owners, Estber Mills and Edna Mills. The purchasers were R. F. Hogan and Sally Hogan. The purchase price was \$1575.00.

The Hogans assigned their interest in the contract on January 25, 1947 to the Plastinos (parents of Mrs. Hogan). The Plastinos never assumed the contract, nor agreed to be bound by its terms in any respect. It would have been a legal impossibility for Mills to require any compliance with the contract whatsoever. Actually the

only control Mills had, so far as the Plastinos were concerned, was to cancel or terminate the contract.

Payments were thereafter made by the Plastinos, though not always on time. On one occasion the Plastinos requested (Letter of August 5, 1948, Exhibit 5), and received permission (Letter August 16, 1948) to skip a payment. Three payments were missed in 1946; three missed in 1948; two in 1949 and none in the last six months of 1950. In June, 1950 there was a balance of \$775.27 owing on the contract (Exhibit 25). (The contract of November 7, 1945 should have been paid out in five years—or November 7, 1950).

On January 30, 1950 default for non-payment was declared by Mills in a letter to the Plastinos. It was received February 3, 1950 (Exhibit 18).

On February 4, 1951, the Plastinos tendered a check for \$25.00 (Exhibit 19) to Mills which he refused.

The Plastinos did not communicate with Mills thereafter for more than two years. On August 26, 1953 their attorney tendered the Mills a check for \$675.00 (and a deed for execution) (Exhibit 21), which tender was refused.

The trial court found there had been an abandonment by the Plastinos and denied specific performance.

As to the trespass phase of the case, the following occurred:

On December 7, 1951, Mills sold the timber on Lot 8 to Ray Douglas for \$1500.00 (Exhibit 26).

On December 8, 1951, Douglas sold the timber to Sigmund Wendling for \$1500.00 (Exhibit 26).

In June, 1952, Wendling entered into a written agreement to sell timber from Lot 8, up to \$1500.00 to C. K. Warren (Exhibit 31).

In July, 1952, Warren and George Hodgdon entered into logging partnership (Exhibit 33).

On December 12, 1952, Warren assigned his interest in the contract to Loran D. Harveston for \$225.00 (Exhibit 35).

These above mentioned defendants were charged by the plaintiffs with conspiring to and unlawfully cutting and removing timber from Lot 8 without plaintiff's consent.

The trial court found no evidence of any conspiracy on the part of these defendants.

The trial court held that under the contract of November 7, 1945, Mills had the right to declare a forfeiture—and that this right had not been waived by him.

The trial court further held that the Plastinos abandoned any right they may have had by failing to communicate with Mills for over two years after the declaration of forfeiture.

ARGUMENT

Appellants have specified (Ap. Br. 10) ten alleged errors concerning findings of fact entered by the trial court, and eight alleged errors with respect to the con-

clusions (Ap. Br. 12, 13). Unfortunately counsel for appellants has apparently misread or misconstrued several of the findings. For example it is charged (Spec. 4, Ap. Br. 10) that the trial court stated "The contract had been cancelled on January 1, 1951 for failure to make necessary installment payments or pay the taxes." The record shows that the above quoted language was preceded by the language "defendants Mills notified plaintiffs that, etc." (Tr. 55). Accordingly, this specification (No. 4) can be entirely disregarded, and we do.

Appellants' specification 3 (Ap. Br. 10) seems likewise not to merit consideration. We do not understand counsel's criticism that the finding *implied* that the contract was breached. As stated the finding is 100% correct. Any implications are solely in the mind of the reader. We disregard this specification.

Again the specification (No. 4, Ap. Br. 12) that the trial court concluded "there were no tenders" is baseless. Counsel for appellants has apparently misread Conclusion II. See Tr. 59. We disregard this specification.

As to the remaining specifications since counsel for appellants has not indicated them by number, or otherwise, in the Argument, we feel justified in grouping them and discussing them collectively as falling into the following categories:

- A. Terms and form of the *contract*.
- B. Was there a *forfeiture*?
- C. Was there abandonment?
- D. Conspiracy.
- E. Trespass.

A. There was only one contract.

In the trial court counsel for the appellant tried to establish that the contract of November 7, 1945 was modified. It should be kept in mind that the original contract (November 7, 1945, Exhibit 1) was between Mr. and Mrs. Mills as vendors and Mr. and Mrs. Hogan as purchasers. The contract specified a purchase price of \$1575.00, payable \$100.00 down, and the balance at \$25.00 per month plus interest. This would make approximately a five year contract; to be exact 59 months. It was a printed form contract and contained the provision:

"The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

About a year after the contract was executed Mr. Mills wrote the Hogans that instead of applying the full \$25.00 payments to principal, as provided in the contract, he had credited the payment first to accrued interest and the balance to principal. This letter was dated November 29, 1946 (Exhibit 2), and is set out at page 4 of appellants' brief.

On January 31, 1947 the Hogans wrote the Mills as follows:

"I am sorry to say, that due to our financial position, we have had to turn the property over to

my parents, Mr. & Mrs. M. R. Plastino, 1423 Madrona Drive, Seattle. They will, I am sure, be able to make the payments on time.

My husband and I wish to thank you for your help and patience during the past year. Believe me, we do appreciate it." (Exhibit 104B)

It will be observed (on the reverse side of the contract of November 7, 1945, Exhibit 1) that the assignment by the Hogans to the Plastinos, parents of Mrs. Hogan, is dated January 25, 1945, but this is believed to be a mistake, and should read January 25, 1946.

In the trial court, and on this appeal, counsel for appellants insists that "said contract" now means the contract of November 7, 1945 (Exhibit 1) plus the letter Mills to Hogans, November 29, 1946 (Exhibit 2) plus the letter Mills to Plastinos, August 6, 1948 (Exhibit 6).

We are quite familiar with the rule that a contract may be established by correspondence between two parties. We agree that it is further possible to modify the term of a previous written contract by a subsequent writing. However, for such a writing to constitute a true modification it must be based upon a valuable consideration and understood by the parties to constitute a modification. Otherwise, such writing would lack mutuality and would be of no effect.

We should point out that it is entirely illogical, in any event, to take two isolated letters, forming a part of the correspondence between the parties over a period of several years, and insist that two such letters, only, became a part of the original contract. Why not include *all* of the correspondence or, in any event, such letters

as one from the Plastinos to Mills, September 13, 1950 (Exhibit 16) which was stated:

"I should have written to you sooner but I have delayed because I expected to get back to work any day. I have not worked since April 15th this year and I do expect to be back on the job in the very near future at which time I will begin payments again."

Or why not include the letter of Mills to Plastinos dated March 7, 1950 (Exhibit 13) in which was stated:

"I started to check your book work and on your third payment there was a one cent mistake. So I checked your balance with ours which does not jibe. I also find you have 44 payments, but I have 45, so you missed one some place. Also you have this years taxes \$59.39. This is the tax on the house here in town. Your taxes were \$124.77 which receipt I sent you. The way I have things now you owe \$874.07 with this last payment. I hope this will start you out again."

To include any (or all) of the parties' correspondence would, of course, be an absurdity, in the present case. The contract of November 7, 1945 was *not* modified in any legal sense. Its interpretation by the parties (and Plastinos were not even a party to it) does not constitute modification.

In *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, 80 Ore. 124, 156 Pac. 584, it was held that while it is competent for parties to modify an original contract so as to accomplish substantially a new agreement, the latter stipulation must be one wherein the minds of the parties meet on identically the same proposition. The Supreme Court of Oregon said:

"It was competent for the parties to modify their original contract which would amount to making a new agreement; but this later stipulation, like all others, must be one in which the minds of the parties meet on identically the same proposition. The record shows that the plaintiff proposed certain changes in the contract, but it does not show that the defendant accepted the offer. It was therefore error for the court to say to the jury:

'That a modification of a contract submitted and taken under consideration must be answered. If it is not answered, it is agreed to.'

"No one receiving an overture to change an agreement to which he is a party is obligated to answer the same. His silence cannot be construed as an acceptance if nothing else is shown. The doctrine of contract by offer and acceptance is stated in *Henry v. Harker*, 61 Or. 276, 118 Pac. 205, 122 Pac. 298; and *Lueddemann v. Rudolf*, 154 Pac. 116, 155 Pac. 172."

With reference to what conduct constitutes a modification the following language from *Marnon v. Vaughan Motor Co.*, 184 Or. 103, 194 P. 2d 992 is pertinent:

"With reference to the question of what conduct will constitute modification of a contract it is said in 4 Page on the Law of Contracts 4357, § 2458:

'While the parties to a contract may modify it by a subsequent contract which is shown by their acts, the acts which are relied upon to modify a prior contract must be unequivocal in their character. Acts which are ambiguous in their character, and which are consistent either with the continued existence of the original contract, or with a modification thereof, are not sufficient to establish a modification.

'Conduct which is not necessarily inconsistent with the continuation of a contract, will not be

regarded as showing an implied agreement to discharge it, although such conduct might have been consistent with an agreement to discharge such prior contract.'

"(13) And it is, of course, well established that the minds of the parties must have met upon the asserted modification. 17 C.J.S., Contracts, 1229, § 588; 13 C.J., Contracts, 762, § 950; *Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N.W. 825; *Molostowsky v. Grauer*, Sup Ch., 113 N.Y.S. 679."

It has been held that granting an extension of time in which to complete a contract does not constitute a new contract. *Johnson v. Myers*, 91 Ore. 179, 177 Pac. 631. In this case the Supreme Court of Oregon said:

"Under the contract all of that wood was to be hauled by September 1, 1916. On August 12th the plaintiff wrote to the defendants, asking for an extension of 30 days in which to complete the contract; in response the defendants advised him that they 'would grant him an extension of thirty days'. This did not amount to a new contract; it was merely an extension of time in which to perform the original agreement."

Counsel for appellant observes (p. 4, Ap. Br.) that Mills never advised the Hogans nor Plastinos of any change in the manner of applying interest as indicated in his letter of November 7, 1946 (Exhibit 2). It was probably impossible to so notify the Hogans as they assigned their rights to the Plastinos shortly thereafter. Nor was it incumbent upon Mills to further advise the Plastinos. If they didn't like the arrangement they could have said so. Mills was under no obligation to the Plastinos, in any event.

B. Forfeiture.

Any discussion of forfeiture by the Plastinos involves a consideration of what constituted the contract as well as whether there was a waiver by Mills of any of its terms. Counsel for appellants apparently contends that there could be no forfeiture because Mills by the letter of August 6, 1948 (Exhibit 6), had waived any right to claim a forfeiture. The provision in re forfeiture is as follows:

“But in case the second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms, and at the times above specified, or fail to keep any of the other terms or conditions of this agreement, time of payment and strict performance being declared to be of the essence of this agreement, then the first party shall have the right to declare this agreement null and void and foreclose by strict foreclosure in equity, and in either of such cases, all the right and interest hereby created or then existing in favor of the second party derived under this agreement shall utterly cease and determine, and the premises aforesaid shall revert and revest in the first party without any declaration of forfeiture or act of re-entry, or without any other act by first party to be performed and without any right of the second party of reclamation of compensation for money paid or for improvements made as absolutely, fully and perfectly as if this agreement had never been made.”

It is further counsel's contention that Mills not only waived this provision regarding forfeiture by writing the letter of August 6, 1948 (Exhibit 6), but it was Mills' *duty to advise Plastinos* if he wasn't going to rely on it in the future. This was never the intent of the parties involved. The language of the letter itself disputes any

such construction. First of all the letter was in answer to the letter the Plastinos wrote on August 5, 1948 (Exhibit 5), in which was said:

"I am short to the extent that I have to ask if you will hold off my August 1st payment till I get caught up which I hope will be very soon."

Mills wrote back:

"I am very sorry to hear of your daughter's sickness and hope for the best for her recovery. It is quite all right to *skip your payment for August* and any other time when you are short." (Exhibit 6, emphasis added).

By this letter Mills excused non-payment of one month only—namely, August. He did offer to let Plastinos skip payments in the future *when they were short*, but certainly they had the duty to inform Mills of such a situation and request permission to skip payment. Mills had no duty to write and ask them each month if they were "short". Any such contention is an absurdity and would render the contract of November 7, 1945 a nudum pactum.

On January 30, 1951, Mills wrote the Plastinos as follows:

"Your contract was cancelled, January 1, 1951, for failing to keep up your payments and taxes." (Exhibit 18).

Now whether this was sufficient as a notice of forfeiture is entirely unimportant. It was so *regarded* by the Plastinos. If they did not agree with the procedure it was their duty to advise Mills. At the time of the cancellation they were behind over seven months in their payments (unexcused). The forfeiture provision in the

contract was still in effect. Neither Exhibit 2, Exhibit 6 or any other writing between the parties varied or nullified the effect of the final paragraph of the original contract (Exhibit 1) namely:

"The second party (purchasers) further agrees that failure by the first party (vendors) at any time to require performance by the second party of any provision hereof shall in no way effect their right hereunder to enforce the same, nor shall any waiver by said first party of any breach of any provision hereof be held to be a waiver of any succeeding breach of any such provision or as a waiver of the provision itself."

None of the parties involved ever contended that this final paragraph was not operative. Mills relied on it for over two years. After Plastinos consulted with attorneys, the letter, tendering a check for \$675.00, was sent on August 26, 1953 to Mills, who refused it (Exhibit 105A). In its opinion, the trial court stated (Tr. 52):

"A vendor who has not received a payment for almost seven months has the privilege of declaring the contract null and void in accordance with other provisions of the contract even though he has on prior occasions waived strict performance of the requirement to make the monthly installments.

"I am even more convinced that the failure of the plaintiffs to communicate with the defendant Estber Mills or to tender the amount due for a period of more than two years after their \$25.00 check was returned to them constitutes an abandonment of any title which they might have held at that time."

This brings us to a discussion of the most important feature of this case, namely, abandonment of the contract by the Plastinos.

C. Abandonment.

The trial court was impressed by the fact that after receiving Mills' letter stating the contract had been cancelled the Plastinos never contacted him, remonstrated, nor did anything in connection with the contract until August 26, 1953, when they tendered \$675.00 through their attorney.

A discussion of *Collins v. Keller*, 62 Ore. 169, 124 Pac. 681 seems particularly appropriate at this point. In that case involving the purchase of a piece of real property in Multnomah County, the evidence showed that two years elapsed before the purchaser offered to make the payment required, and meanwhile the property had doubled in value. It was held the delay amounted to an abandonment by the purchaser. The Supreme Court of Oregon observed:

"The testimony shows beyond dispute that more than two years elapsed before the plaintiff offered to pay, although the defendant had sought to either close the transaction or return the deposit and rescind the bargain. Meanwhile the property had doubled in value. In the light of these facts, we hold that plaintiff's long delay amounts to an abandonment of the contract on his part and renders it inequitable within the discretion of a court of equity to specifically enforce an agreement otherwise in good form. *Chabot v. Winter Park Co.*, 34 Fla. 258, 15 South. 756, 43 Am. St. Rep. 192."

Some criticism has been made by counsel for appellants of the finding of the trial court by suggesting that there was no finding of the facts upon which a conclusion of abandonment was based. But counsel overlooks the fact that the word "abandonment" itself includes

not only physical acts of a party, but also his intent in respect thereto. *Sharkey v. Candiani*, 48 Ore. 112, 85 Pac 219. This is also established by *Hull v. Clemens*, 200 Ore. 533, 267 P. 2d 225, wherein it was held that abandonment of an equitable title in realty is entirely unilateral, in that it requires action by only the possessor of such title. Here the Supreme Court of Oregon said:

"However, it is well established that an unperfected equitable title may be lost by abandonment. *Mineral Land Investment Co. v. Bishop Iron Co.*, 134 Minn. 412, 195 N.W. 966, L.R.A. 1917D, 905. This court recently held in *Powers v. Coos Bay Lumber Co., Or.*, 263 P. 2d 913, that the rights conferred by an easement may be extinguished by abandonment. That decision also held that in abandonment time is an immaterial element. It pointed out that the moment intention to abandon unites with acts of relinquishment, the abandonment is complete.

". . . His actions about the time when the 1942 payment fell due are strongly indicative of abandonment. It will be recalled that the Hulls were then selling their cattle and that they had met with financial misfortunes.

". . . Very likely Hull's plight, when the day came to make the 1942 payment was an unfortunate one. He had suffered severe financial reverses and had resorted to the sale of his cattle. Seemingly, when the time came to make the 1942 payment, he was avoiding Clemens. His own testimony indicates that about that time he was trying to avoid the service of process upon him in a case which a man by the name of Jordan had filed. It is not unusual in situations of that kind for the victim of misfortune to pull up his stakes and move on to another place which offers greater hope."

If appellant acquiesced in the notice of cancellation received by Mills then they abandoned any rights they had under the contract, and have no cause of suit. At the expense of repetition we summarize the facts:

1. Up to the latter part of the year 1949 the appellants had skipped several payments without objection from Mr. Mills, the vendor. In fact Mr. Mills, prior to that time, had written letters giving his express consent for them to skip some payments. Commencing in the latter part of the year 1949, appellants' payments were prompt and regular until June, 1950.

2. In June, 1950, appellants, without notice of any kind to Mills and without any further letter from Mills, abruptly quit making payments on the contract and never made any payments thereafter.

3. On January 30, 1951, the vendor Mills, by letter, cancelled the contract by reason of the non-payment of purchase price and taxes. This notice of cancellation was sent to appellants by registered mail and was received by them, according to the register return slip, February 3, 1951 (Exhibit 18).

4. On February 4, 1951, one day after appellants received letter of cancellation, they mailed to Mills another check for \$25.00. Mills immediately returned the check with a statement that the contract had been cancelled, and this letter and check which Mills returned were received by appellants on February 7, 1951 (Exhibit 20).

5. After the receipt by appellants of the letter of cancellation, they never in any manner objected or

remonstrated against the cancellation and did not in any manner write, telephone or contact Mr. Mills in reference to said contract, or otherwise, until approximately August, 1953 (Tr. 94).

6. Mills sold the timber, and logging operation to remove the timber were carried on by some of the defendants in this cause.

7. Late in August, 1953, appellants contacted Mr. Mills and then had John Hathaway, an attorney of Tillamook, Oregon, write Mr. Mills a letter on August 26, 1953. By this letter a deed was requested and a check, which appellants had secured and held for more than one year, for \$675.00 was tendered to Mills. It is admitted that this check was for an insufficient amount. It has been stipulated that there was \$775.00 due on contract on July 1, 1950 (Exhibit 25).

8. Appellants made no payments on the property since June, 1950, and Mills continued to pay the taxes.

9. Appellants by their two assignments from R. F. and Sally Hogan never assumed the obligations of the purchasers. Appellants were not obligated to Mills and Mills could not have forced them to pay for the property. It is most important to keep in mind that appellants had not obligated themselves to Mills or assumed any obligations of the purchase contract when determining the effect of their conduct. *Boston Store v. Newbury*, D. C. Ill. 1949, 83 F. Supp. 442.

It is these facts that form the basis for the contention that appellant, long prior to the bringing of this suit,

by their conduct, acquiesced in cancellation of contract and abandoned the same.

The authorities definitely hold that a vendee may abandon a contract, by conduct, and no notice to the vendee is required when the contract has been so abandoned. *Anderson v. Hurlbert*, 109 Ore. 284, 219 Pac. 1092. *Geroy v. Upper*, 182 Ore. 535, 187 P. 2d 662.

So here the appellants knew that the contract provided that any waiver by Mills of any provision of the contract would not "be held to be a waiver of any succeeding breach of any such provision."

With this knowledge appellants quit making payments in June, 1950. After waiting seven months without receiving any payments, Mills on January 30, 1951, by letter, cancelled the contract on account of failure to make payments. Appellants for two and one-half years remained silent after receiving the letter from Mills cancelling the contract.

Appellants well knew that Mills could not force them to pay the balance owing on the contract. They had assumed nothing under their assignments.

Under such circumstances the conduct of appellants was such as to indicate an intention to abandon the contract. Their silence and their failure to contact Mills in any way after receiving letter of cancellation was a clear acquiescence in the attempted cancellation of contract by Mills, even though it be admitted that Mills had no right to do so at the time the letter was written.

The appellants abruptly quit making all payments for seven months prior to the attempted cancellation and they remained absolutely silent without objection or remonstrating in any way for more than two years after receiving letter of cancellation.

In the case of *Newell v. Stone Co.*, Calif., 184 Pac. 659, 9 A.L.R. 993, the court considered a similar situation and said:

"The plaintiff could not take advantage of his own fault. (Citing authorities) Plaintiff was in default when the notice was received by him. True, his prior default had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract; but he could not, by merely saying nothing, gain the right to demand repayment of the installments of the purchase price previously made."

The only excuse offered by appellants was the uncorroborated and unsupported testimony of Mrs. Plastico that some lawyer in Seattle advised appellants to get a bank check for the amount owing and hold the check until a foreclosure suit was commenced (Tr. 94).

Such testimony was clearly immaterial and irrelevant, inconsistent and hearsay. No qualified attorney would give such advice. Appellants did not attempt to produce any supporting testimony from such attorney. Mr. Plastico was present at the trial and did not corroborate his co-plaintiff.

The language in *Percy v. Miller*, 197 Ore. 230, 251 P. 2d 463, is quite pertinent:

"It is a general rule of equitable jurisprudence that a plaintiff coming into equity for specific per-

formance must show not only that he has a valid, legally enforceable contract, but also that he had complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract, in their entirety, and to do whatever has been made a condition precedent on his part. 49 Am. Jur., Specific Performance, 53, § 40; 5 Pomeroy, Equity Jurisprudence, 2d Ed. 4972, § 2227."

In *DeWaal v. Califf*, 182 Ore. 93, 185 P. 2d 577, it was held that a contractor was not entitled to specific performance of a building contract providing that if he failed to complete the work by February 22 the owners might terminate his right to proceed, and the owners did so on May 4th. The Supreme Court of Oregon said:

"Plaintiff's own evidence is to the effect that he had refused to do any more work on the house until additional payments had been made to him by defendants and that without such additional payments he was financially unable to purchase the necessary materials for its completion. Under the terms of the contract the house was to be completed by February 22, 1945. It was not until May 4th of that year, and after the plaintiff had ceased to work on the building, that the defendants notified him that they were "taking over the work and will complete the same according to the contract."

D. Conspiracy.

In order to recover damages for the removal of the timber from Lot 8 it was necessary for the appellant to allege *and prove* a conspiracy on the part of the various defendants to cut and remove timber from the premises

of the appellants. Since, as before pointed out, the appellants did not own Lot 8, which at all times has been owned in fee by the Mills, it would seem that the charge of trespass was doomed to dismissal at the proper time.

Appellants specify as an error of the trial court its failure to conclude there was a conspiracy (Ap. Br., p. 13). This is rather surprising, in view of the fact that counsel for appellants is himself unable to point out what the conspiracy consists of (Ap. Br., p. 25). An attempt is made to denominate the acts of the defendants as either a conspiracy or confederation—while it is admitted that nomenclature is not an issue—the inability to typify is significant. In any event there was a total and embarrassing failure on the part of the appellants to establish either conspiracy, confederation or even *association* on the part of the defendants to effect an unlawful purpose. This is further demonstrated by the invectives hurled by counsel for appellants in the direction of Mr. Mills, claiming he was in court with unclean hands. This is the most surprising aspect of this bizarre proceedings. First, it is the first instance coming to the writer's attention where a defendant has been hailed into court on a charge of having unclean hands. The charge is in the nature of an equitable estoppel, and should not be the basis of an original action. But irrespective of that feature we fail to understand how Mills' alleged unclean hands could soil the other defendants. It certainly doesn't establish a conspiracy, confederation or association. (May we parenthetically point out that it was *impossible* to establish a conspiracy of the defendants because none in fact existed.)

Addressing, for the moment, our remarks to the charges against Mills (commencing page 30 Aps. Brief).

1. Although he had a recorded contract of sale *he told no one of it*. The fact of recording told the public.

2. Misrepresentation of tax liability. No such misrepresentation was proven.

3. The trial court did not admire him for the manner of cancelling the contract. Mills himself is not on trial—his personality is of no concern to court or counsel.

4. He executed a “receipt”. This is counsel’s language. The instrument itself speaks for itself. It reads:

“We hereby sell to Ray Douglas all timber on Lot 8 in Section 22 Township 1 North of Range 10 West of Willamette Meridian for \$1500.00.
Paid in full.”

Such a writing was held to be a conveyance in *Fredrick v. Fox* (Cal. 1949), 204 P. 2d 126.

5. Sold 43.46 acres without knowing the amount was there. There still is no competent evidence that there wasn’t.

6. Testified he did not change the terms of the contract. He didn’t.

7. Initiated the chain of causation and assisted in its final unlawful stages. This is nothing but a jumble of words and is a charge of nothing.

A similar tirade is directed against Wendling (Aps. Br., p. 32) which we find it unnecessary to answer.

We conclude by saying there is a complete lack of evidence of conspiracy or confederacy (nomenclature is not an issue).

E. Trespass.

The appellants have specified as error the supposed failure of the trial court to find on trespass and destruction of appellants' property. The trial court found and commented on the various activities or connection of the defendants with the removal of the timber. The trial court found generally that the defendants were entitled to a judgment in their favor. There was no error on the part of the trial court. The argument of counsel for appellants to the contrary is without merit. The suggestion (Aps. Br., p. 25) that the court had obtained information concerning the facts of the conspiracy to trespass from a *trial brief* submitted to it is rather surprising. We were not aware that a brief of counsel becomes evidence.

CONCLUSION

The opinion of the trial court appears in its entirety in the Transcript, commencing at page 46. It is an excellent summation of the case. We commend it to Your Honor's attention.

We conclude in asking that the decree of the trial court be sustained in all particulars.

Respectfully submitted,

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Attorneys for Appellees.

December 1, 1955.

**In the United States Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JACOB (JAY) PALEY and LILLIAN PALEY, RESPONDENTS

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE PETITIONER

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FILED

DEC -5 1955

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14,792

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JACOB (JAY) PALEY and LILLIAN PALEY, RESPONDENTS

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Tax Court (R. 23-25) is reported at 22 T.C. 1236.

JURISDICTION

This petition for review (R. 26-27) involves federal income taxes for the taxable years 1948 and 1949. On March 20, 1952, the Commissioner of Internal Revenue mailed to the taxpayers notice of deficiencies in the total amount of \$36,249.09. (R. 10-17.) Within ninety days thereafter and on May 13, 1952, the taxpayers filed a petition with the Tax Court for a redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 5-9.)

The decision of the Tax Court was entered on January 10, 1955. (R. 25.) The case is brought to this Court by a petition for review filed on April 1, 1955. (R. 26-27.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Under Section 117 (j) of the Internal Revenue Code of 1939, a net gain from the sale of depreciable business assets is entitled to capital gain treatment, but a net loss from such sale is deductible in full as an ordinary loss. Where a taxpayer sustains individual losses of this nature, but in the same year is a member of a partnership which realizes net gains of the same nature, must he offset his distributive share of the partnership gains against his individual losses in computing the net figure contemplated by Section 117 (j)?

STATUTE INVOLVED

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*.

STATEMENT

A stipulation of the parties (R. 19-22) was adopted by the Tax Court as its findings of fact (R. 23). As revealed by the stipulation and the exhibits thereto (which consist of the pertinent individual and partnership tax returns) the facts material to this appeal may be summarized as follows:

Taxpayers were husband and wife. They filed joint returns for the years 1948 and 1949. (R. 19; Stip. Exs. 1-A, 2-B.) During the same period the husband was associated with Joseph M. Schenck in a partnership (referred to herein as Arrowhead) which filed

partnership returns for the fiscal years ended October 31, 1948 and 1949. The husband held a 50 percent interest in the profits of the partnership. (R. 19-20; Stip. Exs. 3-C, 4-D.)

In 1948 taxpayers sustained a casualty fire loss. It is stipulated that this loss was of the type described under Section 117 (j); and that the correct amount of the loss was \$44,420.12. In 1949 the taxpayers sustained an individual proprietorship net loss in the amount \$106,214.98. It is stipulated that this loss, also, was of the type described under Section 117 (j). (R. 20-21.)

The Arrowhead partnership sold the Arrowhead Springs Hotel prior to the tax years in question; and realized gains therefrom in 1948 and 1949. It is stipulated that these gains were of the type described under Section 117 (j) of the Internal Revenue Code of 1939. It is further stipulated that the taxpayer-husband's share of these gains for 1948 was \$37,675.62, and his share for 1949 was \$28,333.28. (R. 20-22.)

In their joint returns for 1948 and 1949, taxpayers deducted in full their individual Section 117 (j) losses, in computing their net income. As for the taxpayer-husband's shares of the Arrowhead partnership's Section 117 (j) gains, the taxpayers took 50 percent of these into account as long-term capital gain. (R. 20-22.)

Upon auditing taxpayers' returns for 1948 and 1949, the Commissioner determined deficiencies upon the ground *inter alia* that the taxpayer-husband's shares of the Arrowhead partnership Section 117 (j) gains for 1948 and 1949 should have been taken into account 100 percent, together with taxpayers' individual Sec-

tion 117 (j) losses, in computing a single Section 117 (j) net figure. (R. 21-22.)

The Tax Court ruled, however, that taxpayers' manner of reporting separately their individual and partnership Section 117 (j) items was correct. (R. 23-25.)

STATEMENT OF POINT TO BE URGED

Computation of a taxpayer's net gain or loss under Section 117 (j) of the Internal Revenue Code of 1939 must include the taxpayer's share of partnership gains or losses under Section 117 (j), and the Tax Court erred in ruling to the contrary.

SUMMARY OF ARGUMENT

Under Section 117 (j) of the Internal Revenue Code of 1939, a net gain from the sale of certain non-capital assets is entitled to capital gain treatment, but a net loss from such sale is deductible in full as an ordinary loss. In the case at bar the question of law presented is whether computation of a taxpayer's net gain or loss under Section 117 (j) must include his share of such partnership gains or losses. The Tax Court answered this question in the negative. The Commissioner contends that the Tax Court erred and that its decision must be reversed.

The partnership provisions of the 1939 Code reveal that a partnership has no independent status taxwise save for limited accounting purposes. The individual partners are the taxpayers; collectively, they realize the partnership gains and sustain the partnership losses. It follows that partnership items retain their identity in the hands of the partners, despite the computations of partnership income required by the statute.

This is particularly true where Congress has ex-

pressly required that a taxpayer take into account all of his gains and losses of a given nature in reaching a net figure. Section 117 (j), which so provides, is a relief measure focussed upon the individual taxpayer. The net figure thereunder is ambivalent; if a gain, it is capital, if a loss, it is ordinary. Insulation of partnership gains and losses under Section 117 (j) from those of the individual partners would allow a taxpayer to have both a capital gain and an ordinary loss under the same provision in the same year, and thus would result—as in the case at bar—in extending a double benefit, which was obviously not the intent of Congress.

We submit that the soundness of this view is confirmed not only by the general role of partnerships under the federal tax laws, but by the legislative history of Section 117 (j), and by the relevant principles established in Supreme Court and appellate decisions—in particular, *Neuberger v. Commissioner*, 311 U. S. 83, which ruled that a taxpayer might offset his individual losses from non-capital security transactions against his share of partnership gains of the same nature.

For these reasons we submit that the decision of the Tax Court should be reversed.

ARGUMENT

Computation of a Taxpayer's Net Gain or Loss Under Section 117 (j) of the Internal Revenue Code of 1939 Must Include the Taxpayer's Share of Partnership Gains or Losses Under Section 117 (j), and the Tax Court Erred in Ruling to the Contrary

A. Preliminary

Upon undisputed facts this appeal presents a single question of law: Must the computation of a taxpayer's net gain or loss under Section 117 (j) of the Internal

Revenue Code of 1939 include the taxpayer's share of partnership gains or losses under Section 117 (j)? The Tax Court has answered this question in the negative. The Commissioner contends that the question must be answered in the affirmative, and hence that the decision below should be reversed.

Section 117 (j) (Appendix, *infra*) deals with the tax consequences of the sale, exchange or involuntary conversion of certain non-capital assets "used in the trade or business". Section 117 (j)(2) (Appendix, *infra*) provides in substance that if gains exceed losses in the sale, exchange or conversion of such assets, "such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months"; but that if such gains do not exceed such losses, "such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets." In brief, if there is a net gain, it is taxable as a long-term capital gain; but if there is a net loss, it is deductible in full as an ordinary loss.

In the case at bar, as detailed in the statement, *supra*, it is undisputed that taxpayers sustained individual losses under Section 117 (j) in 1948 and 1949; and that in the same years the taxpayer-husband was a member of a partnership which realized gains under Section 117 (j). In taxpayers' joint returns for 1948 and 1949 taxpayers' individual Section 117 (j) losses were deducted in full in computing net income; but the taxpayer-husband's shares of the partnership Section 117 (j) gains were taken into account as long-term capital gains. The Tax Court ruled that this treatment was proper; that Section 117 (j) applies to a partnership as an entity distinct from the individual partners;

and hence that gains realized by a partnership under Section 117 (j) are fixed once and for all as long-term capital gains, in which the partners share distributively. In this view it is immaterial that the partners may have individual losses under Section 117 (j). Such losses are deductible in full as ordinary losses, without reference to or offset by the partner's distributive share of the partnership's Section 117 (j) gains.

We submit that this construction of Section 117 (j) is in error; that Congress intended and has clearly required the computation of a single net gain or loss under Section 117 (j) for a given taxpayer in a given tax year; and that to permit insulation of partnership gain or loss in the manner sanctioned by the Tax Court is to defeat this intention and requirement. We submit that a partnership's net gain or loss under Section 117 (j) must retain its identity as such in the hands of the partners, and that each partner's distributive share of such gain or loss must be offset against his individual gain or loss of the same nature. As demonstrated below, this result follows necessarily ^{from} ~~from~~ the terms of the relevant statutes, from legislative history, and from the principles established by controlling Supreme Court and appellate decisions.

B. Taxpayers must offset the husband's distributive share of partnership gains under Section 117 (j) in 1948 and 1949 against their individual losses of the same nature in the same years

The question of statutory construction presented by this appeal is one which requires consideration of the limited role played by partnerships in federal income taxation.

Unlike a corporation, a partnership is not a taxpaying entity for federal income tax purposes. Section 181 of the Internal Revenue Code of 1939 (Appendix, *infra*) constitutes a reenactment of the provision long-established in the revenue laws that "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity." And while Section 187 (Appendix, *infra*) requires that partnerships file yearly informational returns, ~~and~~ we submit that no taxes are assessed on the basis of these returns. It is only as partnership gain or loss enters distributively into the computation of the net incomes of the individual partners that such gains or loss has tax consequences.

It is evident, however, that before partnership gains and losses can enter distributively into the individual incomes of the partners there must be some consistent method to which all the partners must adhere in determining the total gains and losses which are to be distributed. This method is provided by Sections 182 and 183 (Appendix, *infra*). Section 183 provides that "The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual," except that capital items shall be segregated before such computation, and that partnerships shall not be allowed either the so-called "charitable contribution" deduction nor the standard deduction allowed to individuals. Section 182 provides that the individual partner, in computing his net income, shall include, whether or not distribution is made to him: (a) his distributive share of the partnership's short-term capital gains and losses as part of his individual short-term capital gains and losses; (b) his distributive share of the partnership's long-term capital gains and losses

as part of his individual long-term capital gains and losses; and (c) his distributive share of the partnership's ordinary net income or loss, computed as provided in Section 183.

It is apparent from the above provisions that a partnership is an accounting unit, although not a taxpaying unit, under the federal tax laws. In order to make the computations required by Section 182 a partnership must have its own accounting method and period, as distinct from the accounting methods and periods of its individual members. Thus partnership gains and losses may be reflected in the individual returns of the partners in years other than those in which they would have been reported if they had been individual gains or losses of the partners. The accounting status thus accorded to partnerships is obviously desirable in view of the diversity which may obtain between the partners individually as to accounting methods and periods.

But it should be noted that the only necessary consequence of the partnership's accounting status is that it determines *when* the partners must report partnership gains and losses. It does not follow that particular items of gain realized and loss sustained by the partnership lose their identity in the computations of net partnership gains and losses which precede reflection of distributive shares in the partners' individual returns. The underlying concept, embodied in Section 181, is that the partners are the taxpayers. It is the partners collectively who realize directly the partnership gains and sustain directly the partnership losses. *Craig v. United States*, 31 F. Supp. 132 (C. Cls.).

To what extent, then, do particular items of partnership gain and loss retain their original identity in the hands of the individual partners?

Like preceding Revenue Acts, the 1939 Code provides some answers—but only partial answers—to this question. As noted above, Section 183 provides that partnership capital items shall be segregated; and Section 182 provides that each partner shall take into account separately his distributive shares of the partnership's short-term capital gains and losses, long-term capital gains and losses, and ordinary net income or loss. In general, then, partnership items retain their identity as capital or ordinary in the hands of the partners. And in particular, Sections 183 through 189 provide that certain non-capital partnership items—none relevant here—retain their identity in the hands of the partners, largely in the form of credits against income.

The instant appeal involves Section 117 (j) gains or losses. Each Section 117 (j) gain or loss originates in the disposition of a non-capital asset; but such gains and losses are neither capital nor ordinary in nature until reduced to a net figure which, if a gain, is capital but, if a loss, is ordinary. The partnership provisions of the 1939 Code, summarized above, do not deal expressly with these ambivalent items, any more than they deal expressly with a host of other particular items of gain and loss. It could well be argued that this lack of particularity in the statute is of no significance in view of the underlying principle that it is the partners who collectively realize partnership gains and sustain partnership losses. * As it happens, however, it is unnecessary

* In the new Internal Revenue Code of 1954 Congress has provided expressly in Section 702 (a) (3) that each partner shall take into account separately his distributive share of partnership gains and losses from sales or exchanges of property described in Section 1231 of the 1954 Code, which is the successor to Section 117 (j) of the 1939 Code. Furthermore, Section 702 (b) states that

to argue about this point; for the Supreme Court has spoken in a decision which disposes of the matter and which, we believe, requires reversal in the case at bar. That is the decision in *Neuberger v. Commissioner*, 311 U.S. 83.

The *Neuberger* case involved Section 23 (r) of the Revenue Act of 1932, c. 209, 47 Stat. 169, which provided that "Losses from sales or exchanges of stocks and bonds * * * which are not capital assets * * * shall be allowed [as deductions from gross income] only to the extent of the gains from such sales or exchanges * * *." The taxpayer there had sustained individual loss of the nature described by Section 23 (r) in the same year that a partnership of which he was a member had realized gain of the same nature. The Supreme Court held that the taxpayer was entitled to deduct his individual loss to the extent of his distributive share of the partnership gain. In other words, the Supreme Court ruled that a partnership's Section 23 (r) gains retained their identity as such in the hands of the individual partners.

It is to be noted that the partnership provisions of the Revenue Act of 1932 involved in the *Neuberger* case were, in all essential respects, very similar to the partnership provisions of the 1939 Code. Section 181 of the 1932 Act provided that "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity"; and Section 189 provided for the filing of partnership informational returns. Sec-

the character of any item of income, gain, loss, deduction or credit included in a partner's distributive share shall be determined as if such item were realized directly from the source from which realized by the partnership or incurred in the same manner as incurred by the partnership. Legislative history reveals that Congress considered these provisions to be merely declaratory of current law and practice. H. Rep. No. 1337, 83d Cong., 2d Sess., p. 221; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 89.

tion 183 provided that "The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual"; and Section 186 provided for the segregation of partnership capital gain and loss, the separate reporting thereof by the partnership, and the separate taxation thereof to the individual partners. Section 185 also provided for the segregation of the partnership's earned income. Sections 184 and 188 provided that certain non-capital items be carried over distributively from the partnership to the partners as credits against net income.

In short, the partnership provisions of the 1932 Act contain all of the salient features pointed out above in the partnership provisions of the 1939 Code. Under both the 1932 Act and the 1939 Code, partnerships are not taxpaying entities but are accounting units; partnership capital gains and losses are segregated, reported separately and taxed separately; and certain non-capital items retain their identity in the hands of the partners to be applied distributively as credits against net income.

The Commissioner argued before the Supreme Court in *Neuberger*—as the taxpayers may argue here—that because the partnership provisions of the tax laws specified certain instances in which partnership items retained their identity in the hands of the partners, like survival of any other items was precluded. The Supreme Court rejected this argument, saying (p. 88):

Nor is the deduction claimed here precluded because Congress, in §§ 184-188, has particularized instances where partnership income retains its identity in the individual partner's return. The maxim *expressio unius est exclusio alterius* is an aid to construction, not a rule of law. It can never override clear and contrary evidences of Congress-

sional intent. *United States v. Barnes*, 222 U.S. 513.

In searching for general evidence of Congressional intent in the partnership provisions of the 1932 Act the Supreme Court said (pp. 86-87):

Respondent points out, however, that under §§ 181-189 of the Revenue Act of 1932 * * * partnership income is computed on an entity basis, that items of partnership gross income do not appear on a partner's return, that only partnership net income is reflected in the individual partner's income and is reported only in the form of a distributable or distributed share. He contends that since partnership income is computed in the same way as an individual's the deduction afforded by §§ 23 (r) (1) to the partnership is a distinct privilege not to be confused or combined with that afforded the individual.

Nevertheless, the Supreme Court emphasized that (p 88):

In requiring a partnership informational return although only individual partners pay any tax, Congress recognized the partnership both as a business unit and as an association of individuals. This weakens rather than strengthens respondent's argument that the privileges are distinct or that the unit characteristics of the partnership must be emphasized. Compare *Jennings v. Commissioner*, 110 F. 2d 945; *Craik v. United States*, 31 F. Supp. 132; *United States v. Coulby*, 251 F. 982 (affirmed, 258 F. 27).

Thus the Court found that the Congressional intent expressed in the partnership provisions was to treat

partnerships as aggregations of individuals, save for accounting purposes. This accords with the view that partnership gains and losses are attributable directly to the individual partners in all respects save that of when such gains and losses shall be reported by the partners.

However, the Supreme Court did not rest there. Searching for more specific Congressional intent, it scrutinized the legislative history of Section 23 (r) and noted that the intention behind its enactment was to limit a taxpayer's losses from non-capital security transactions to the extent of his gains from such transactions, thus stemming the large (and theretofore unlimited) deductions which had followed in the wake of the 1929 crash. The Court recognized that the focus of this intention was upon the individual taxpayer. It was the individual taxpayer whose deductions were to be limited. On the other hand it was the individual taxpayer who was entitled as of right to Section 23 (r) deductions to the extent of his Section 23 (r) gains. And the Court held that the taxpayer was entitled to deduct his individual Section 23 (r) losses to the extent of his distributive share of partnership Section 23 (r) gains, saying (pp. 85-86)—

Nowhere does there appear any intention to deny to a taxpayer who chooses to execute part of his security transactions in partnership with another the right to deductions which plainly would be available to him if he had executed all of them singly.

It should be noted that the Supreme Court reached this result despite the fact that the gains and losses involved resulted from the disposition of non-capital assets; and that the partnership provisions of the Revenue Act of 1932 in no way excepted such items of gain

or loss from the requirement that, after segregation of capital items, the ordinary net income or loss of the partnership be computed as in the case of an individual. It should also be noted that the tax consequences of a Section 23 (r) gain depended entirely upon whether there were deductible losses of the same nature; while Section 23 (r) losses were not available as deductions unless there were comparable gains. In short, only after gathering together the gains and losses of the taxpayer and reaching a net figure could the tax consequences be determined.

The relevance of these considerations, and of the reasoning of the Supreme Court in *Neuberger*, must be apparent. The gains and losses covered by Section 117 (j) result from the disposition of non-capital assets; and the partnership provisions of the 1939 Code in no way except such gains and losses from the requirement that, after segregation of capital items, the ordinary net income or loss of the partnership be computed as in the case of an individual. But the important fact is that Section 117 (j) contemplates a comingling of *all* a taxpayer's gains or losses from the disposition of certain assets. It is only after gathering together the gains and losses of the taxpayer and reaching a net figure that the tax consequences can be determined.

Was it the intention of Congress that partnership gains or losses under Section 117 (j) should be insulated from gains or losses of the individual partners under the same section? Legislative history requires a negative answer to that question. Section 117 (j) was added to the 1939 Code by the Revenue Act of 1942; and it is stated in the House Report on that Act (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 53 (1942-2 Cum. Bull. 372, 415)):

Under existing law, the gain or loss from the sale or exchange of depreciable property is not treated

as a capital gain or capital loss, but as an ordinary gain or an ordinary loss. This rule was originally inserted as a relief provision to enable corporations to have the full benefit of a loss from the sale of machinery, instead of being limited by the capital loss provisions, which would permit it only a certain percentage of the loss. It was felt at that time that the taxpayer should not be denied the full loss because it sold the property at a loss instead of abandoning the property. While this rule provided relief in case a loss was realized, it appears that many taxpayers are able to dispose of their depreciable property at a gain over its depreciated cost. To treat such a gain as an ordinary gain will result in an undue hardship to the taxpayer.

Thus Section 117 (j) was enacted as a relief measure for the taxpayer. It is the taxpayer who is to receive capital gain treatment of his net gains under Section 117 (j) in order to preclude undue hardship. It is the taxpayer who is allowed to deduct in full his net losses under Section 117 (j) in order that he may not be penalized for selling the property instead of simply abandoning it. The focus of this section and of the intention of Congress being thus upon the taxpayer, it follows, under the reasoning of the *Neuberger* decision, that a taxpayer's distributive share of partnership gains or losses under Section 117 (j) must be included in computing his net gain or loss of that nature. Congress surely did not intend that a taxpayer should benefit twice from Section 117 (j) in the same year, receiving capital gain treatment as to his share of partnership gains, and at the same time benefiting from the deduction in full of his individual losses.

Just how unrealistic and inequitable such a double benefit could be is illustrated by the hypothetical situa-

tion in which a taxpayer sustains individual losses under Section 117 (j) of \$50,000, while receiving in the same year \$100,000 as his distributive share of partnership gains of the same nature. If the taxpayer's share of the partnership gains were not set off against his individual losses, but fixed once and for all as long-term capital gains, the taxpayer would take 50 percent of his share into account, or \$50,000, in computing net income. At the same time, he would deduct his individual losses of \$50,000 in full. Thus, the individual and partnership items would cancel out; and if the taxpayer had no other income, he would pay not one cent in taxes, although he had netted \$50,000 in actual income. On the other hand, if both the \$100,000 gain and the \$50,000 loss had been partnership items, or if both had been individual items, they would have been set off against each other in reaching a single net figure under Section 117 (j) and a tax would have been payable on the net gain of \$50,000. The only possible conclusion, we submit, is that no such inconsistent application of Section 117 (j) was either contemplated or intended by Congress.

We submit that the soundness of this conclusion is self-evident. Nor does the *Neuberger* decision stand alone as authority for this result, if authority be needed. In *Mosbacher v. United States*, 311 U.S. 619, the Court was presented with the converse of the *Neuberger* question, i.e., whether a partner's distributive share of partnership Section 23 (r) losses could be offset against individual gains of the same nature. The Second Circuit had held that this could not be done. The Supreme Court reversed and remanded on authority of the *Neuberger* decision.

Similarly, in *Jennings v. Commissioner*, 110 F. 2d 945 (C.A. 5th), certiorari denied, 311 U.S. 704 the question was whether a partner could offset his individual

wagering losses against his distributive share of partnership wagering gains under Section 23 (g) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, which provided that: "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions." The court answered the question in the affirmative, saying (p. 946)—

A partnership is recognized as an entity separate from the partners in bankruptcy proceedings, but not in income taxation. *United States v. Coulby*, 6 Cir., 258 F. 27. For many years the Revenue Acts have provided that "individuals carrying on business in partnership shall be liable for income tax only in their individual capacity." * * * The partnership return is for information, and to secure uniformity and save repetition in the individual returns. It ascertains each partner's gain and apportions it to him to be taxed, whether distributed or not. It does not transform his share in the gain.

Similarly, in *Craig v. United States*, 31 F. Supp. 132 (C. Cls.), it was held that a nonresident alien who was a member of a partnership operating in the United States, but with income from sources without the United States, was not taxable upon his share of partnership income so far as allocable to such sources under Section 213 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which provided that "In the case of nonresident alien individuals, gross income includes only the gross income from sources within the United States." There too, as in the other decisions discussed above, items of partnership gain and loss were held to retain their identity in the hands of the partners

even though no specific warrant for such retention was to be found in the federal tax laws.

The basic principle underlying these cases was expressed by the court in *Craig v. United States*, *supra*, when it said (p. 135):

We are convinced that Congress intended that partnership income should be treated as though it had been received by the partners individually.

In its opinion herein (R. 23-25) the Tax Court relies upon its decision in *Ammann v. Commissioner*, 22 T.C. 1106, which is now before the Fifth Circuit for review. No other authority is cited. In *Ammann*, the Tax Court cited two of its own decisions; but they are not in point. They merely illustrate that, since a partnership has its own accounting method and period, elections on behalf of a partnership involving such method and period are binding on the partners. Thus in *Scherf v. Commissioner*, 20 T.C. 346, where a partnership sold its assets under circumstances permitting treatment of the sale either as a completed transaction or as an installment sale, it was held that the election of the partnership to report the sale on the former basis was binding on the partners individually. Similarly, in *Bentz Oil Corp. v. Commissioner*, 20 T.C. 565, it was held that a partnership is entitled either to deduct as necessary expenses or to capitalize intangible drilling costs, and that this election is binding on the partners individually. Plainly, these decisions are concerned only with the independent accounting status of the partnership, which determines when the partners shall report their distributive shares of partnership items. They do not in any way support the

proposition that partnership items lose their identity in the computation of net partnership gain or loss, in the face of a clear Congressional requirement that all of a taxpayer's gains and losses of a certain nature shall be taken together to reach a net figure. Such a requirement surely means that a partner's distributive share of partnership gains or losses of the described sort must be taken into account.

The Commissioner adopted the position reflected in this brief after the *Neuberger* decision, and has adhered consistently to this view as a matter of administrative practice since that time. See G.C.M. 22491, 1941-1 Cum. Bull. 374; G.C.M. 22461, 1941-1 Cum. Bull. 295; I.T. 3981, 1949-2 Cum. Bull. 78.

We submit that both authority and common sense confirm the soundness of this position; and hence that computation of a taxpayer's net gain or loss under Section 117 (j) of the 1939 Code must include the taxpayer's share of such partnership gains or losses.

It follows that the Tax Court erred in its decision below, since it failed to rule that the husband-taxpayer's distributive share of partnership gains under Section 117 (j) in 1948 and 1949 should be offset against taxpayers' individual losses of the same nature in the same years.

CONCLUSION

For the reasons set forth above, we submit that the Tax Court's decision is in error and should be reversed.

Respectfully submitted,

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NOVEMBER, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(b) [As amended by Sec. 150(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

* * * * *

(j) [As added by Sec. 151(b) of the Revenue Act of 1942, *supra*, and as amended by Sec. 127(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than

6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k) (1) or (2) is applicable.

(2) *General Rule*.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

(26 U.S.C. 1952 ed., Sec. 117.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) [As amended by Sec. 150(g)(1)(A) of the Revenue Act of 1942, *supra*] As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) [As amended by Sec. 150(g)(1)(B) of the Revenue Act of 1942, *supra*] As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1952 ed., Sec. 182.)

SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

(a) [As amended by Sec. 9(c)(1) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b), (c), and (d).

(b) [As amended by Section 150(g)(2)(A) of the Revenue Act of 1942, *supra*] *Segregation of Items.*—

(1) *Capital gains and losses.*—There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) *Ordinary net income or loss.*—After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

* * * * *

(26 U.S.C. 1952 ed., Sec. 183.)

SEC. 187. PARTNERSHIP RETURNS.

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

(26 U.S.C. 1952 ed., Sec. 187.)

No. 14,792.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

JACOB (JAY) PALEY and LILLIAN PALEY,

Respondents.

On Petition for Review of the Decision of the Tax Court
of the United States.

BRIEF FOR THE RESPONDENTS.

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JUL 19 1950

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vs.

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Respondents.

On Petition for Review of the Decision of the Tax Court
of the United States.

BRIEF FOR THE RESPONDENTS.

Opinion Below.

The opinion of the Tax Court [R. 23-25] is reported
at 22 T. C. 1236.

Jurisdiction.

This petition for review [R. 26-27] involves federal income taxes for the taxable years 1948 and 1949. On March 20, 1952, the Commissioner of Internal Revenue mailed to the taxpayers notice of deficiencies in the total amount of \$36,249.09. [R. 10-17.] Within ninety days thereafter and on May 13, 1952, the taxpayers filed a petition with the Tax Court for a redetermination of the deficiencies under the provisions of Section 272 of the

Internal Revenue Code of 1939. [R. 3, 5-9.] The decision of the Tax Court was entered on January 10, 1955. [R. 25.] The case is brought to this Court by a petition for review filed on April 1, 1955. [R. 26-27.] Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

Statement of the Case.

1. Facts.

A stipulation of the parties [R. 19-22] was adopted by the Tax Court as its findings of fact. [R. 23.] As revealed by the stipulation and the exhibits thereto (which consist of the pertinent individual and partnership tax returns) the facts material to this appeal may be summarized as follows:

Taxpayers were husband and wife. They filed joint returns for the years 1948 and 1949. [R. 19; Stip. Exs. 1-A, 2-B.] During the same period the husband was associated with Joseph M. Schenck in a partnership (referred to herein as Arrowhead) which filed partnership returns for the fiscal years ended October 31, 1948 and 1949. The husband held a 50 per cent interest in the profits of the partnership. [R. 19-20; Stip. Exs. 3-C, 4-D.]

In 1948 taxpayers sustained a casualty fire loss. It is stipulated that this loss was of the type described under Section 117(j); and that the correct amount of the loss was \$44,420.12. In 1949 the taxpayers sustained an individual proprietorship net loss in the amount of \$106,214.98. It is stipulated that this loss, also, was of the type described under Section 117(j). [R. 20-21.]

The Arrowhead partnership sold the Arrowhead Springs Hotel prior to the tax years in question; and realized

gains therefrom in 1948 and 1949. It is stipulated that these gains were of the type described under Section 117(j) of the Internal Revenue Code of 1939. It is further stipulated that the taxpayer-husband's share of these gains for 1948 was \$37,675.62, and his share for 1949 was \$28,333.28. [R. 20-22.]

In their joint returns for 1948 and 1949 taxpayers reported taxpayer-husband's distributive share of the partnership capital gains and losses (which included partnership Section 117(j) gains and losses) adding such share to their individual capital gains and losses. The resulting capital gain was then reduced by fifty (50) per cent. Taxpayers individual Section 117(j) losses were deducted in full. [R. 20-22.]

2. Question Involved.

Was the Arrowhead partnership an entity for the purpose of determining gains or losses from the sales or exchanges of assets described in Section 117(j) I. R. C. (Appx., *infra*) and Respondents distributive share thereof? Stating the question differently, are gains and losses from sales or exchanges of Section 117(j) assets to be balanced at partnership level or at partner level?

3. Manner in Which Question Was Raised.

Upon auditing taxpayers' returns for 1948 and 1949 the Commissioner determined deficiencies upon the ground *inter alia* that taxpayers had improperly reported the taxpayer-husband's share of the Arrowhead partnership Section 117(j) gains. [R. 21-22.] The Tax Court ruled however that taxpayers manner of reporting the partnership Section 117(j) gains was correct. [R. 23-25.]

Argument of the Case.

1. Summary of Argument.

Respondents computed their gains and losses from sale or exchanges of assets described in Section 117(j) I. R. C. (Appx., *infra*), in the way intended by Congress and approved by the Commissioner. The partnership 117(j) transactions were aggregated with the result that the gains from such transactions exceeded the losses from such transactions. The net gain was then considered a long-term capital gain, segregated on the partnership return, and each partner's distributive share shown on page 4 of the partnership return. Respondents on their individual returns for both 1948 and 1949 reported Respondents-husband's share of the partnership capital gains and losses adding such share to their individual capital gains and losses. The resulting capital gain was then reduced by fifty (50%) per cent in accordance with Section 117(b) I. R. C. (Appx., *infra*). Respondents aggregated their individual Section 117(j) gains and losses and deducted the net loss in full.

Respondents contend that the entity theory of partnerships must be applied in computing the ordinary net income and the gains or losses from sales or exchanges of Section 117(j) assets of a partnership; that if the partnership's 117(j) transactions result in a loss, the loss is combined with the ordinary net income or loss of the partnership; that if the partnership's 117(j) transactions result in a gain, the gain then becomes a long-term capital gain and distributable to the partners as such; that the partner combines his distributive share of such gain with his other capital gains and losses in determining his taxable net income and in computing his tax under the alternative tax computation if applicable.

Respondents contend that the Commissioner's determination that Respondent-husband's distributive share of partnership 117(j) transactions be combined with Respondents individual 117(j) transactions is erroneous and illegal.

2. Detail of Argument.

The partnership in which Respondent-husband was a partner is an entity for the purpose of determining gains or losses from the sales or exchanges of assets described in Section 117(j), I. R. C. and the Respondent-husband's distributive share thereof, and therefore such gains or losses should not be aggregated with Respondents' individual Section 117(j) I. R. C. gains and losses in determining whether the Respondents have a net gain or loss under Section 117(j) I. R. C.

It has long been recognized that the Internal Revenue Code uses both the entity and aggregate theories in subjecting the income of partners to tax. In *Neuberger v. Commissioner*, 311 U. S. 83 (1940), at page 88, Mr. Justice Murphy stated, "In requiring a partnership informational return although only individual partners pay any tax, Congress recognized the partnership both as a business unit and as an association of individuals".

The aggregate theory is exemplified by Section 181 I. R. C. (Appx., *infra*) which requires partners to pay income tax upon partnership profits only in their individual capacity, and also by Section 182, I. R. C. (Appx., *infra*), which provides that long- and short-term capital gains and losses and ordinary income and losses retain their character after passing through the partnership into the returns of the individual partners.

Section 183 I. R. C. (Appx., *infra*) on the other hand, provides that the net income of the partnership shall be computed in the same manner as in the case of an individual. This section recognizes the partnership as an entity for the purpose of computing income and was undoubtedly enacted because of the universal practice of maintaining one set of books of account for a partnership. Section 187 I. R. C. (Appx., *infra*) recognizes the partnership as an entity wherein it requires an informational return to be filed by or for the partnership. Again Section 188 I. R. C. (Appx., *infra*) recognizes the entity theory in that it explains the method of correlating the payment of tax by a partner with the reporting of income by the partnership when the partner and the partnership have different taxable years. Section 190 I. R. C. (Appx., *infra*) fully recognizes the partnership as an entity for the purpose of allowing an amortization deduction on certain emergency facilities owned by the partnership.

The Courts have recognized the entity theory where a taxpayer retires from his partnership or sells his interest to an incoming partner. In such cases he is held to have capital gain or loss even though the gain or loss is attributable to the value of inventory or other noncapital assets of the partnership.

Commissioner v. Lehman, 165 F. 2d 383, cert. den. 334 U. S. 819;

Commissioner v. Smith, 173 F. 2d 470 affirm. 10 T. C. 398, cert. den. 338 U. S. 818;

Long v. Commissioner, 173 F. 2d 471 cert. den. 338 U. S. 818;

Dudley T. Humphrey, 32 B. T. A. 280.

The entity theory of partnerships has also been recognized by the Tax Court where a partnership continues after

one partner is bought out by other partners. The basis of property later sold by the partnership is not disturbed by the sale of one partner's interest.

Robert E. Ford, 6 T. C. 499.

In many other situations the Courts and Commissioner have recognized a partnership as an entity. A few of these situations follow: A partnership elects to write off intangible drilling expenses; a corporate partner is not entitled to take the eighty-five (85%) per cent credit on its share of dividends received by the partnership; a partnership makes a separate computation regarding percentage depletion; a partnership elects the cash or accrual method of accounting, the method of accounting for bad debts and the choice of a fiscal year; a partner looks only to his share of the partnership's net income in determining the limitation of his medical expenses and contributions.

It is Respondents' position (1) that Congress intended that Section 117(j) gains and losses of a partnership must be aggregated at the partnership level without reference to the partner's individual Section 117(j) gains and losses (which treatment would be consistent with the entity theory of partnerships) and, (2) that the Commissioner's contention that the partner's individual Section 117(j) gains and losses must be aggregated with his share of the partnership's Section 117(j) gains and losses (which treatment would be consistent with the aggregate theory of partnerships) is improper.

Let us first consider the pertinent provisions of the Internal Revenue Code. Section 183(b) provides for a segregation on the partnership returns of ordinary net income from gains and losses from sales or exchanges of *capital* assets. (It should be noted that there is no provision that gains or losses from sales or exchanges of

Section 117(j) assets be so segregated.) Section 117 I. R. C. which defines *capital* assets in effect divides all assets into three classifications:

1. All property except stock in trade, property includible in inventory, property held primarily for sale, depreciable property, or real property used in a trade or business. The assets not excluded are called capital assets.

2. All property excluded from group one, except property used in the trade or business as defined in Section 117(j) I. R. C. These assets are called non-capital assets.

3. All property used in the trade or business, subject to allowance for depreciation, held for six months, and certain real property. These assets are not capital assets and for convenience are called Section 117(j) assets.

The only assets involved in the case at bar are Section 117(j) assets.

Inasmuch as Section 183 requires a segregation of only *capital* gains and losses, the question then is—by what authority must gains or losses from the sale or exchange of assets of a type described in Section 117(j) be segregated?

A careful reading of Section 117(j) I. R. C. shows that gains and losses from the sale or exchange of Section 117(j) assets are “considered as gains and losses from sales or exchanges of capital assets held for six months” under certain circumstances and that such gains or losses are considered as ordinary gains or losses under certain other circumstances. If the circumstances are present which convert the gains and losses from the sale of

Section 117(j) assets into *capital* gains and losses, *i.e.*, if the gains from the sale of 117(j) assets plus gains from conversion of such assets and capital assets held more than six months exceed the losses from such sales, then such gains and losses are capital gains and come within Section 183(b) and must be segregated.

If the circumstances which convert the gains and losses from the sale of Section 117(j) assets into capital gains and losses are *not* present, *i. e.*, if the gains do *not* exceed the losses, then the gains and losses are *not* considered as gains and losses from the sale or exchange of *capital* assets. If such gains and losses are not *capital* gains and losses, then Section 183(b) does not require or permit their segregation and there is no other provision requiring or permitting such segregation. The net loss must then be reported upon the partnership return as ordinary loss or as a reduction of ordinary income in arriving at net ordinary income.

Respondents contend that this is an express recognition by Congress of the entity theory of partnerships. If Congress had intended that partnership 117(j) gains and losses be segregated and carried over into the individual return of a partner and there combined with the partner's other 117(j) gains and losses Congress would have amended Section 183(b) to provide that *capital* gains and losses and 117(j) gains and losses be segregated. This was not done in the Revenue Act of 1942 when Section 117(j) was enacted or in any subsequent Revenue Act.

Let us next consider the position of the Commissioner in similar situations.

That Congress intended Section 117(j) to be applied to the partnership as an entity has been admitted by the

Commissioner in his treatment of elections by taxpayers that the cutting of timber be considered as a sale or exchange of the timber. Section 117(j) provides that the term "property used in the trade or business" includes timber if the taxpayer owned or had a contract right to cut the timber for more than six months prior to the beginning of the year. If the taxpayer so elects upon his return, the cutting of such timber is considered as the sale or exchange of such timber cut during the year. In *I. T. 3713, 1945 C. B. 178*, the Commissioner ruled that with respect to partnership items, the right of election under 117(k) to have the cutting of timber considered as a sale or exchange of such timber extends to and must be exercised by the partnership. The reasoning of the Commissioner in that ruling is clear and concise and most certainly applies to other assets described in Section 117(j) as well as to timber. The reasoning of the Commissioner is set forth verbatim:

"Pursuant to the provisions of Section 117(k)(1) of the Code, *supra*, the election to secure the benefits therein provided must be made by the taxpayer.

"Section 3797(a)(14) of the Code defines 'taxpayer' as follows: (14) Taxpayer.—The term 'taxpayer' means any person subject to a tax imposed by this title.

"Section 181 of the Code provides as follows:

"Section 181 PARTNERSHIP NOT TAXABLE—Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

"In view of the provisions of Section 181 of the Code, *supra*, a partnership is not taxable as such and may not be classified as a 'taxpayer', as that term is defined in Section 3797(a)(14) of the Code, *supra*. Nevertheless, a partnership is treated as a unit in

Section 183 of the Code, under which Section the partnership net income must be computed, and in Section 187 of the Code, which requires that every partnership shall make a return for each taxable year of its gross income and deductions, together with other information for the purpose of carrying out the provisions of Chapter 1 of the Code, relating to income tax. Also, under Section 29.187-1 of Regulations 111, a partnership is required to adopt its own annual accounting period. *In order to accomplish a proper reflection of partnership gross income and deductions in the ascertainment of partnership net income, partnership items must be recognized as unit items returnable as such in the partnership return.* (Emphasis added) It follows, therefore, that in so far as partnership items are concerned, the right to the election provided for in Section 117(k)(1) of the Code, *supra*, upon which there depends a benefit granted to taxpayers generally, must be considered as available to a partnership, and the right to the election must be exercised by it.”

In the case of *John G. Scherf, Jr. v. Commissioner*, 20 T. C. 346 (Docket No. 31267), more fully discussed in a later paragraph in this brief, the Commissioner was taking the opposite position he is taking in the case at bar. In the *Scherf* case, the Commissioner argued that the Petitioner’s full distributive share of the gain as reported on the partnership return must be included in Petitioner’s income. Petitioner there had attempted to report his distributive share of certain capital gains on the installment basis but the Tax Court decided in favor of the Commissioner.

Let us lastly consider the various decisions pertaining to the case at bar.

Petitioner in its brief relies heavily upon the decision of the Supreme Court in *Neuberger v. Commissioner of Internal Revenue*, 311 U. S. 83, but that case is distinguishable from the case at bar. The *Neuberger* case arose under Section 23 of the 1932 Revenue Act which dealt with losses from sales of stocks and bonds which were not capital assets. The Court stated "The basic and narrow question is whether, in computing the income of an individual partner, the word 'gains' in Section 23(r)(1) includes gains from sales or exchanges of partnership stocks and bonds which are not capital assets as defined in Section 101." The year involved was 1932 which was six years before the law permitted the offsetting of an individual's capital gains and losses against his distributive share of the partnership's capital gains and losses. The case was decided in 1940, two years before Section 117(j) was enacted into law. At most the case is authority for the proposition that the entity theory of partnerships does not apply where Congress plainly intended otherwise. In the case at bar Petitioner has not shown that Congress intended that the entity theory should not apply to Section 117(j) gains and losses.

Respondent contends that Congress intended that the entity theory *should* apply by not requiring segregation on the partnership information return of Section 117(j) transactions as well as capital transactions. The Tax Court has not cited the *Neuberger* decision in the *Scherf* case, 20 T. C. 346, the *Ammann* case, 22 T. C. 1106, or in its decision of the case at bar. Either the government has not seen fit to cite the *Neuberger* case or the Tax Court has believed it to be distinguishable.

In *John G. Scherf, Jr. v. Commissioner*, 20 T. C. 346 decided on May 14, 1953, the Tax Court stated at page 347:

“An understanding of the roll of a partnership in our income tax laws is essential to the proper analysis of this case. * * * The partnership return is more than just an information return. It has consequences that go beyond the mere description to the Commissioner of profits of the enterprise.”

In that case a partnership sold its business and assets consisting of machinery, equipment, and good will. Although the Court made no point of it, it should be noted that the machinery and equipment were Section 117(j) assets. The partnership reported the gain as a long-term capital gain and Petitioner there attempted to report his share of the partnership net long-term capital gain on the installment basis. The Court stated that Petitioner apparently contended that capital gains form no part of the partnership return but the Court drew a distinction between segregation of capital gains and elimination of capital gains. The Court stated at page 350:

“Section 182 carries out the theory of ‘segregation’ rather than ‘elimination’ and provides the machinery for allocating to each partner his distributive share of capital gain (whether short-term or long-term) as well as ordinary income. If capital gain were eliminated from the partnership return, there would be no reason at all for the provisions of Section 182(a) and (b). Indeed, the very act of segregating the capital gains and losses as provided in Section 183(b) requires a computation by the partnership, whereby the amount of gain or loss is determined by reference to the partnership basis for the assets, Section 113(a) 13; the result thus obtained is reflected in the segregated income according to the method of accounting properly applicable thereto, and the distributive share of each partner is then allocated to him in accordance with Section 182. The

segregation provisions in Section 183(b)(1), relied upon by petitioner, were never intended to have any such unusual consequences as those urged upon us by him. Such consequences would be disruptive of the entire statutory scheme and would render nugatory the provisions of Section 182(a) and (b)."

Respondents submit that Section 44(b) and Section 182 are both "relief" provisions. Although one section grants relief by permitting the reporting of income over a period of years while the other permits the reporting of only one-half the gain and all of the losses from certain transactions, both provisions should be accorded similar treatment when incurred by a partnership.

In *Ammann v. Commissioner*, 22 T. C. 1106, the facts are identical with those in the case at bar except it was the partnership which sustained the losses and the petitioner who realized the gain. Only Section 117(j) assets were involved. The Tax Court held that Section 182(c) required the petitioner to report his share of the partnership loss as ordinary loss. It stated:

"Section 117(j)(2)(A) refers to the computation of net income and is some further indication that Section 117(j) refers to the gains and losses of the taxpayer or the unit (partnership) for which 'net income,' gains, and losses are separately computed and reported for income tax purposes and does not mean that the computation is not made in the case of a partnership but is made only on the basis of the return of each separate partner. The Commissioner has pointed to no statutory or other authority supporting his contrary contention. Section 117(j) is not limited to a 'taxpayer' as contended by the Commissioner, but applies to a partnership as well."

Conclusion.

Respondents submit that the pertinent provisions of the Internal Revenue Code, the position of the Commissioner in similar situations, and the various decisions discussed in this brief all sustain the Tax Court's decision; that the Tax Court's decision is correct and should be affirmed.

Respectfully submitted,

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APPENDIX.

Statute and Regulations Involved.

INTERNAL REVENUE CODE OF 1939:

Section 117(a) Definitions—As used in this chapter,

(1) *Capital Assets*.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 23(1), or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or before March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

(2) *Short-term Capital Gain*.—The term “short-term capital gain” means gain from the sale or exchange of a capital asset held for not more than six (6) months, if and to the extent such gain is taken into account in computing net income;

(3) *Short-term Capital Loss*.—The term “short-term capital loss” means loss from the sale or exchange of a capital asset held for not more than six (6) months, if and to the extent such loss is taken into account in computing net income;

(4) Long-term Capital Gain.—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than six (6) months, if and to the extent such gain is taken into account in computing net income;

(5) Long-term Capital Loss.—The term “Long-term capital loss” means loss from the sale or exchange of a capital asset held for more than six (6) months, if and to the extent such loss is taken into account in computing net income;

(6) Net Short-term Capital Gain.—The term “net short-term capital gain” means the excess of short-term capital gains for the taxable year over the short-term capital losses for such year;

(7) Net Short-term Capital Loss.—The term “net short-term capital loss” means the excess of short-term capital losses for the taxable year over the short-term capital gains for such year;

(8) Net Long-term Capital Gain.—The term “net long-term capital gain” means the excess of long-term capital gains for the taxable year over the long-term capital losses for such year;

(9) Net Long-term Capital Loss.—The term “net long-term capital loss” means the excess of long-term capital losses for the taxable year over the long-term capital gains for such year.

(10) Net Capital Gain.—

(A) Corporations.—In the case of a corporation, the term “net capital gain” means the excess of the gains from sales or exchanges of capital assets over the losses from such sales or exchanges; and

(B) Other Taxpayers.—In the case of a taxpayer other than a corporation, the term “net capital gain” means the excess of (i) the sum of the gains from sales or exchanges of capital assets, plus net income of the taxpayer or \$1,000, whichever is smaller, over (ii) the losses from such sales or exchanges. For purposes of this subparagraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets. If the tax is to be computed under Supplement T, “net income” as used in this paragraph shall be read as “adjusted gross income.”

(11) Net Capital Loss.—The term “net capital loss” means the excess of the losses from sales or exchanges of capital assets over the sum allowed under subsection (d). For the purpose of determining losses under this paragraph, amounts which are short-term capital losses under subsection (e)(1) shall be excluded.

(b) Percentage Taken Into Account.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net capital gain, net capital loss and net income:

100 per centum if the capital asset has been held for not more than six (6) months;

50 per centum if the capital asset has been held for more than six (6) months.

* * * * *

Section 117(j) Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business—

(1) Definition of Property Used in the Trade or Business.—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than six (6) months, and real property used in the trade or business, held for more than six (6) months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k) (1) or (2) is applicable.

(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than six (6) months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than six (6) months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent

taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than six (6) months shall be considered losses from a compulsory or involuntary conversion.

(k) Gain or loss Upon the Cutting of Timber.—

(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. In case such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this paragraph such election shall apply with respect to all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding upon the taxpayer for the taxable year for which the election is made

and for all subsequent years, unless the Commissioner, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this paragraph except with the consent of the Commissioner,

(2) In the case of the disposal of timber (held for more than six (6) months prior to such disposal) by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber, the difference between the amount received for such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber.

* * * * *

Section 181. Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

Section 182. In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than six (6) months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than six months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than six (6) months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than six (6) months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in Section 183(b).

Section 183. (a) General Rule.—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b), (c) and (d).

(b) Segregation of Items:—

(1) Capital Gains and Losses.—There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) Ordinary Net Income or Loss.—After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

(c) Charitable Contributions.—In computing the net income of the partnership the so-called “charitable contribution” deduction allowed by Section 23(o) shall not be allowed; but each partner shall be considered as having made payment, within his taxable year, of his distributive portion of any contribution or gift, payment of which was made by the partnership within its taxable year, of the character which would be allowed to the partnership as a deduction under such section if this subsection had not been enacted.

(d) Standard Deduction.—The standard deduction provided in section 23 (aa) shall not be allowed.

Section 187. Every partnership shall make a return for such taxable year, stating specifically the item of its gross income and the deductions allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

Section 188. If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending within or with the taxable year of the partner.

Section 190. In the case of emergency facilities of a partnership, the benefit of the deduction for amortization allowed by section 23(t) shall not be allowed to the members of a partnership but shall be allowed to the partnership in the same manner and to the same extent as in the case of an individual.

No. 14792

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

JACOB (JAY) PALEY and LILLIAN PALEY,

Respondents.

PETITION FOR REHEARING.

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Respondents.

PETITION FOR REHEARING.

*To the Honorable William E. Orr, Richard H. Chambers,
and Gilbert H. Jertberg:*

The above-named appellees hereby respectfully request a rehearing of the appeal in the above-entitled cause for the following reasons:

1. The Court's decision erroneously applied alleged equitable considerations to the legal interpretation of Sections 182 and 183 of the Internal Revenue Code of 1939 as amended.

2. The Court's decision fails to follow the intent of Congress expressed in "Supplement F—Partnership" to the Internal Revenue Code of 1939 as amended.

3. The Court's decision erroneously relies on the decision of the Supreme Court of the United States in

Neuberger v. Commissioner, 311 U. S. 83, failing to recognize the basic changes in the partnership sections of the Internal Revenue Act of 1932 there involved and the Internal Revenue Code of 1939 as amended here involved.

I.

**The Court's Decision Seems to Be Based Upon the
"Equitable Maxim" That Tax Statutes Should Be
Interpreted to Result in Maximum Taxation.**

Taxpayer Jay Paley, in the years in question was a partner in the Arrowhead Springs partnership, which had recognized gains from the sale of 117(j) assets in excess of the recognized losses from such sales. Said taxpayer, and taxpayer Lillian Paley, had individual losses of the type described in 117(j) of the Internal Revenue Code, which exceeded the gains from the sale or exchange of such assets in the years in question. The Arrowhead Springs partnership filed a partnership return during the years in question in which it segregated capital gains and losses and ordinary net income or loss pursuant to Section 183 of the Internal Revenue Code of 1939 as amended. The Arrowhead Springs partnership had a net gain for the years in question from 117(j) transactions and pursuant to 117(j), included the net gain in its capital gains and losses. Taxpayer, Jay Paley, reported his distributive share of the partnership's ordinary net income and his distributive share of the partnership's capital gains and losses in his individual return. The question before the Court is whether respondents should pay a deficiency tax because the Arrowhead Springs partnership followed the provisions of 117(j) of the Internal Revenue Code of 1939 in determining the partnership's total capital gains. The Tax Court determined that there was no deficiency.

This Court reversed the Tax Court and refused to follow the formula required by Congress in Sections 182 and 183 of the Internal Revenue Code of 1939 in the reporting of partner's income from partnerships on the grounds that to follow that formula

“would ascribe to Congress the intent that a taxpayer should benefit twice from §117(j) in the same year . . . We find nothing to indicate that Congress intended such an inequitable . . . application of §117(j).” (Op. p. 5.)

So-called equitable considerations compelled the Court to ignore the mandate of Congress that (1) “The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual. . . .” (Sec. 183 of the Int. Rev. Code of 1939 as amended), and (2) “If . . . the recognized gains upon sales . . . of property used in the trade or business . . . held for more than six months . . . exceed the recognized losses from such sales . . . such gains and losses shall be considered as gains and losses from sale . . . of capital assets held for more than six months” (Sec. 117(j), subpar. 2 of the Int. Rev. Code of 1939 as amended), and (3) “In computing the net income of each partner, he shall include . . . (b) as part of his gains and losses from sales . . . of capital assets held for more than six months his distributive share of the gains and losses of the partnership from sales . . . of capital assets held for more than six months.” (Sec. 182, Int. Rev. Code of 1939 as amended.)

With all due respect to this Court, it is unreasonable to require a taxpayer to pay approximately \$40,000 of additional taxes and interest by a judicial decision based upon the “equitable maxim” that courts of law should

interpret tax statutes in a way which results in maximum taxation because any other interpretation would be inequitable to the Government. This is new to any accepted principles of law applicable to the interpretation of tax statutes. Certainly, a strained interpretation of a statute should not be adopted, nor a logical one disregarded because the individual taxpayer will pay more or less taxes. The results in terms of the amount of tax to be paid should not control the legal interpretation of tax laws, the very enactment of which requires amendment. Nor should the absence of a statute to cover a particular situation be a rule of penalty imposed by judicial decision upon the taxpayer.

The Court's concern about the taxpayer's position being inequitable seems to come from the argument advanced by the Commissioner on pages 16 and 17 of his brief. The Commissioner was concerned with the fact that in the hypothetical situation stated by him the taxpayer "would pay not one cent in taxes, although he had netted \$50,000 in actual income." If this argument, which was adopted by the Court, is carried to its ultimate conclusion, then the Courts may disregard the internal revenue sections allowing special treatment for the sale of capital assets. To use the Government's figures, if an individual in any one tax year sold capital assets for \$100,000 and in the same year suffered an ordinary loss of \$50,000, the taxpayer would put \$50,000 in his pocket and "would not pay one cent in taxes" and this, so the argument goes, could not have been intended by Congress because it is inequitable to the Government.

Certainly, when the Tax Court has determined a question in favor of the taxpayer, that determination should not be reversed because the Tax Court's interpretation would be inequitable.

Neither the Commissioner nor the Second Circuit Court of Appeals thought that the argument which taxpayers are advancing here was unsound or inequitable in the case of *Commissioner of Internal Revenue v. Lamont*, 156 F. 2d 800. The Commissioner used taxpayer's argument in that case to prohibit partnership capital losses being offset against individual capital gains under the Revenue Act of 1936. The result there was that the taxpayer paid more tax, which may explain the Commissioner's inconsistent position, but certainly does not justify it.

The partnership supplement to the Revenue Act of 1936 involved in the *Lamont* case did not provide for the segregation of capital gains and losses of the partnership as does the 1939 Revenue Code here involved. The 1936 Act was silent as to whether capital gains and losses should be segregated at the partnership level and aggregated with the individual partner's capital gains or losses, the same as the Revenue Code of 1939 is silent as to the segregation and aggregation of 117(j) transactions. (See Secs. 181 to 188 Revenue Act of 1936, titled 26 U. S. C. A. Internal Revenue Acts, 1924 to date, pages 897 and 898.)

The Commissioner argued there that partnership capital gains and losses, *i. e.* 117(a) transactions could not be segregated and aggregated with the individual partner 117(a) transactions. The Second Circuit Court of Appeals at page 804 stated "The elimination of Section 186 of the 1932 Act . . . rendered any further prohibition of a deduction unnecessary in the 1934 and 1936 Acts" and did not allow the taxpayer there to deduct partnership 117(a) losses from his individual 117(a) gains. Section 186 of the 1932 Act read as follows:

"In the case of the members of a partnership the proper part of each share of the net income which

consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under the rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement, but at the rates and in the manner provided in section 101(a) and (b), relating to capital net gains and losses.”

If the elimination of the above section allowing segregation of partnership 117(a) gains and losses from the 1932 act brought about the disallowance of the aggregating of partnership 117(a) and individual 117(a) transactions in the *Lamont* case, then the fact that there is no section in the 1939 Revenue Code allowing the segregating of 117(j) partnership gains and losses with 117(j) individual gains and losses should prevent the Commissioner here from forcing the aggregation of 117(j) partnership and 117(j) individual transactions.

II.

The Decision Is Contrary to the Intent of Congress.

117(j) requires that the gain or loss from the sale of certain assets, such as those involved herein, be treated as a deduction from ordinary income or as a capital gain depending upon whether the total sales of 117(j) assets result in a gain or loss for the year in question. Since we are dealing with two accounting entities, *i. e.* the individual taxpayer and the Arrowhead Springs partnership, and since Congress provided that a partnership must report its income as an individual (Sec. 183 Int. Rev. Code of 1939 as amended), it is logical to presume that Congress anticipated that the 117(j) transactions in the one accounting entity would result in a gain and

in the other a loss, and, hence, treatment in the first entity as capital gain and treatment in the second as an allowable deduction from gross income.

Evidence of the fact that Congress anticipated and intended this result is the manner in which Congress provided for the handling of charitable contributions. Congress knew that if it did not provide for special treatment of charitable contributions in Section 183 of the Internal Revenue Code of 1939 as amended that the partnership, in computing its return as an individual pursuant to Section 183, would be allowed a deduction up to 15 per cent of its gross income; and that each individual partner, when he carried over his distributive share of the partnership net income into his individual return pursuant to 182 of the Internal Revenue Code of 1939 as amended, would get the benefit of the maximum deduction at the partnership level, in addition to which he would also get the benefit of the maximum deduction in his individual return and that the net result would be an allowance to partners of an amount in excess of 15 per cent of their gross income from all sources as an allowable deduction for charitable contributions. Congress did not want the taxpayer to be able to make charitable contributions through a partnership and individually and be able to get a deduction in excess of 15 per cent of the individual partner's gross income from all sources and, hence, included subsection (c) to 183 of the Internal Revenue Code of 1939 as amended providing as follows:

“(c) Charitable contributions.—In computing the net income of the partnership the so-called ‘charitable contribution’ deduction allowed by section 23(o) shall not be allowed; but each partner shall be considered as having made payment, within his taxable year, of his distributive portion of any contribution or gift, payment of which was made by the partner-

ship within its taxable year, of the character which would be allowed to the partnership as a deduction under such section if this subsection had not been enacted."

Further evidence of the intent of Congress that there was to be no aggregation of partnership items with the individual partner's items of the same kind unless specifically provided is the treatment of credits against net income in Section 184 of the Internal Revenue Code of 1939 as amended. It is significant that Section 184 was amended on October 21, 1942, the same date as the addition of subsection (j) to 117. The second sentence of 184, added in 1942, makes it clear that nothing but *net* income or loss and capital gains and losses are to be segregated on the partnership return and, hence, aggregated with the individual partner like items and that there is to be no aggregation of other items, such as 117(j) items between the partnership and the individual partners unless specifically provided. The second sentence of Section 184 provides for the reducing of the credit allowed to the individual partner by Section 25(a)1 and 2, by the amount of the individual partner's distributive share of the deduction taken by the partnership under Section 23(v). This would not have been necessary at all if the Court's interpretation of the partnership sections is correct. Compare the converse of the case at bar, *i. e.* partnership net losses in 117(j) transactions and individual gains with Section 184 and it becomes clear that a deduction granted to the partnership pursuant to 117(j) is not segregated from the partnership return and aggregated with similar individual transactions without a specific requirement that it be done such as is provided in effect by Section 184.

Section 189 of the Internal Revenue Code of 1939 as amended similarly treats net operating losses.

Further evidence of Congressional intent that there be no aggregation of partnership and individual partner's transactions unless specifically provided is the treatment of the standard deduction in Section 183(d) of the Internal Revenue Code of 1939 as amended. Unless a partnership was prohibited from taking the standard deduction of 10 per cent of gross income, individual partners would be able to have an overall standard deduction in excess of the \$1000 or 10 per cent of their gross income from all sources. For example, assume a partnership with \$10,000 gross income in the taxable year in question and a partner owning 50 per cent of the partnership. If the partnership were allowed the standard deduction, then the net income of the partnership would be \$9000, and the individual taxpayer's distributive share thereof would be \$4500. Assuming that the individual partner had \$5500 of income from other sources, his gross income reported on his individual return would be \$10,000 for the year in question, and taking the standard deduction, he would subtract therefrom \$1000 and pay a tax based on a net income of \$9000. He would have been allowed \$1500 of deductions from income from partnership source and other sources, whereas the standard deduction provision, 23(aa) allows an individual taxpayer a maximum of \$1000 or 10 per cent as a standard deduction, whichever is less. To prevent a taxpayer from receiving more than the 10 per cent or \$1000 standard deduction, Congress thought it necessary on October 21, 1942, to add subsection (d) to 183 of the Internal Revenue Code of 1939 as amended reading as follows:

“(d) Standard deduction. In computing the net income of the partnership, the standard deduction provided in section 23(aa) shall not be allowed.”

It is again significant that the passage of subsection (d) to 183 was in the same year that subsection (j) to 117 of the Internal Revenue Code was added, namely, October 21, 1942.

The decision of this Honorable Court has the effect of an amendment to the partnership supplement, which we may characterize by use of the following hypothetical code section, to wit Section 192 of the Internal Revenue Code of 1939 as amended:

“192—117(j) *Partnership Transactions*

“(a) In computing the net income of the partnership, the deduction allowed by §117(j) if the net 117(j) transactions result in a loss for the year involved shall not be allowed to the partnership, but each partner shall be considered as having sustained his distributive portion of the net loss within his taxable year, which was in fact sustained by the partnership and which would be allowed to the partnership as a deduction under 117(j) if this subsection had not been enacted.

“(b) In computing the net capital gains or losses of the partnership pursuant to §183 subdivision 2(a), the treatment as capital gains of the net gains of items mentioned in §117(j) shall not be allowed to the partnership, but each partner shall be considered as having sustained his distributive portion of the net gain within his taxable year, which was in fact sustained by the partnership and which would be treated as a part of the partnership capital gains or losses if this subsection had not been enacted.”

Had Congress passed a section as characterized above the taxpayers herein would not quarrel with the results of the Court's opinion, but we find no such provision in any Internal Revenue Act.

There is no reason for the special subsections dealing with the charitable contributions and the standard deduction in Section 183 of the Internal Revenue Code of 1939 as amended, nor for the passage of Sections 184 and 189 of the Internal Revenue Code of 1939 as amended if this Honorable Court is correct in its interpretations of the applicable partnership sections to the case at bar. The passage of the said code sections was unnecessary if the same results could be accomplished by judicial decision. Such results we urgently and respectfully submit cannot be accomplished without violence to the very essence of our system of taxation by law.

Furthermore, the computation of the partnership net income or loss and net capital gain or loss on the partnership return was an idle act if this Court's decision stands. After having computed the partnership net income or loss and capital gain or loss in accordance with Sections 182 and 183 of the Internal Revenue Code of 1939 as amended, and after using the forms provided by the Government to so calculate the partnership net income, the individual taxpayers are supposed to ignore or disregard the computation. In the event that the partnership had a net gain from partnership 117(j) transactions, each partner would be required to re-compute the partnership's capital gain or loss in order to report his distributive share thereof, and in the event the partnership had a net loss from 117(j) transactions, each partner would be required to re-compute the partnership net income or loss in order to report his distributive share thereof on his individual return.

The incongruous results of this Court's decision outlined above are best seen by looking at the partnership returns and the individual returns in the case at bar. The com-

putation of partnership income on the forms provided by the Commissioner to the taxpayers herein would have served no useful purpose whatsoever except to provide an interesting mental exercise for accountants or attorneys if the Court's decision is correct. The returns do not provide for segregating of 117(j) transaction by the partnership and the computation of the Arrowhead Springs partnership's net capital gains for the years in question must be ignored.

Is it not fair to presume the Commissioner had a different view of the intent of Congress than he is urging herein at the time he caused the forms to be prepared upon which the respondents here reported their 1948 and 1949 income?

III.

The Neuberger Case Is Not Contrary to the Taxpayer's Position.

The Court's decision, as well as the Fifth Circuit's decision in the *Ammann* case, both of which reversed the Tax Court, rely on *Neuberger v. Commissioner*, 311 U. S. 83. The *Ammann* case involved the converse factual situation to the case at bar, *i. e.* partnership 117(j) losses and individual 117(j) gains.

The *Neuberger* case involved the question of whether under the 1932 Revenue Act a partner could offset his individual losses from the sale of securities against his distributive share of partnership gains from the sale of securities. The converse was decided in the companion case, *Mosbacher v. United States*, 311 U. S. 619, *i. e.*, the offsetting of partnership losses against individual gains. Both cases involved the 1932 Revenue Act, which specifically provided in Sections 185 and 186 thereof that

“In the case of members of a partnership the proper part of each share of the net income which consists” of earned income, ordinary net income, capital net gain or capital net loss “shall be determined under the rules and regulations to be prescribed by the Commissioner with the approval of the secretary” and should be taxed to the member as provided in this supplement.

As distinguished from the 1939 Revenue Code, the 1932 Act did not provide a formula indicating the Congressional intent with reference to what parts of partnership income were to be aggregated with the individual partner's income. The 1932 Act instead left that determination to the discretion of the Commissioner with the approval of the secretary in the rather ambiguous language of Sections 185 and 186.

Hence, the whole theory of the 1932 Act was to leave to the Commissioner the problem here involved and involved in the *Neuberger* case whereas the 1939 Revenue Code specifically spelled out a definite formula for the taxing of a partner's share of partnership income in Sections 182 and 183. Nothing was left to the discretion of the Commissioner and there is no longer the reference to the “proper part” of income. Congress decided which parts of partnership income would be taxed to the individual partners. Congress in the 1939 Revenue Code specifically provided that *net* income or loss and capital gains and losses would be segregated on the partnership return and each partner's distributive share thereof aggregated with like items on his individual return. Congress did not provide that 117(j) transactions should be segregated and aggregated with the individual partner's 117(j) transactions.

As discussed at pages 7 through 10, *supra*, the intent of Congress that 117(j) transactions not be aggregated with like individual transactions is seen from the specification of specific items that were to be aggregated. The *Neuberger* case, therefore, dealing with the 1932 Act, which did not involve a formula, cannot be used as authority for the case at bar involving the 1939 Revenue Code with a specific formula provided by Congress. An analysis of the *Lamont* case, *supra*, page 5 demonstrates the correctness of this argument. The Second Circuit Court of Appeals there analyzed the *Neuberger* case in the light of the difference between the 1932 Revenue Act and the 1936 Revenue Act, and the analysis is helpful to this Court although the 1939 Revenue Act here involved spelled out Congress's intent much more specifically than did the 1936 Act involved in the *Lamont* case.

The Second Circuit at pages 802 and 804 analyzed the *Neuberger* case as follows:

“Both taxpayer and the court below stress the omission of the 1933 amendment from later acts; but their chief reliance is upon the *Neuberger* case, *supra*. In fact taxpayer originally did not claim the deduction, but filed a claim for refund based upon that decision after its announcement in November, 1940. In relying on this case they are forced to the interesting analysis of having to repudiate as ill-considered dictum what the opinion says about the course of legislative history, here important, in order to stress what they consider the implications of the actual holding. That case and the companion case of *Mosbacher v. United States*, 311 U. S. 619, 61 S. Ct. 167, 85 L. Ed. 393, concerned income taxes for the year 1932, turning upon the converse of the case here, *i. e.*, the offsetting of individual stock losses against partnership profits. As we have seen, these

were not 'capital assets' as the law then stood. The Court, three justices dissenting, allowed the deduction. This was a reversal of the decision below, *Neuberger v. Commissioner of Internal Revenue*, 2 Cir., 104 F. 2d 649, which followed *Johnston v. Commissioner of Internal Revenue*, 2 Cir., 86 F. 2d 732, 734, certiorari denied 301 U. S. 683, 57 S. Ct., 784, 81 L. Ed. 1341, where this court had held that under the 1932 Act the partnership was a 'tax computing unit,' and that the 1933 amendment was only 'inserted out of abundant caution when that law was passed and as but a clarification of existing law.' The Supreme Court said, however, 311 U. S. 83, 88, 61 S. Ct. 97, 101, 85 L. Ed. 58, that in this Act 'Congress recognized the partnership both as a business unit and as an association of individuals' and, finding no specific prohibition of the deduction of individual losses from the partner's distributive share of partnership income, held it allowable. And this, so the argument goes, leads to a like holding in the converse situation here in view of the omission of the 1933 amendment from later acts.

"But the Supreme Court itself had a different interpretation. It held its conclusion to be 'confirmed by the action of Congress since 1932.' Citing first the 1933 amendment as reaching 'the converse of the instant case' (*i. e.*, the case here), it continued: 'More significantly, in 1938, after the Treasury Department had ruled to the contrary (citing the Treasury Regulations, *infra*), Congress expressly provided for the deduction of individual security losses from similar partnership gains (citing the 1938 Act, *supra*, and the House Committee Report, *infra*). That the amendment of 1933 changed and the Revenue Act of 1938 restored the law of 1932 as we have explained it is plain from the legislative history

of the two Acts and of §23(r)(1).’ *Neuberger v. Commissioner of Internal Revenue, supra*, 311 U. S. 83, 89, 90, 61 S. Ct. 97, 102, 85 L. Ed. 58. . . .

“Thus the Subcommittee of the Committee on Ways and Means gave the correct explanation for the elimination of the 1933 amendment when it said that this provision ‘was not retained by the Revenue Act of 1934 for the reason that the elimination of section 186 of the Revenue Act of 1932 by the 1934 Act, which permitted the allocation of partnership capital net losses to the individual members, rendered such provision unnecessary.’ The report goes on to point out that the partnership net income was determined in the same manner as that of the individual and thus subject to the provisions of §117(a) and the limitations of §117(d) of the 1934 and 1936 Acts. ‘The net result was that the net capital losses realized by partnerships were no longer available to the individual partners as offsets against either their ordinary incomes or their capital gains.’ Proposed Revision of the Revenue Laws of 1938, Report of the Subcommittee of the Committee on Ways and Means, 75th Cong., 3d Sess., 43, 44. This recommendation was adopted by the full committee, which noted the ‘departure from the principle adopted in the Revenue Acts of 1934 and 1936 to the extent that it enables capital net losses of the partnership in the respective categories to be applied, on the basis of the partners’ allocable shares thereof, to offset their individual capital net gains in the same categories.’ H. R. Rep. No. 1860, 75th Cong., 3d Sess., 42, 43, reprinted in 1939-1 Cum. Bull. (Part 2) 728, 759.

“Conceding their trend and meaning, taxpayer and the Tax Court discount the interpretative value of these later actions by Congress, though they were relied on as persuasive in the *Neuberger* case itself.

See also *United States v. Stewart*, 311 U. S. 60, 64, 61 S. Ct. 102, 85 L. Ed. 40. It is also suggested that they were induced by the lower court decisions which were disapproved in the *Neuberger* case. But the reports themselves show that they go on a different rationale, the one in fact which we accept and adopt. That is in short that the elimination of §186 of the 1932 Act and the change in system of computing and allocating capital net losses and gains, including the specific allowance of the \$2,000 deduction, rendered any further prohibition of a deduction unnecessary to make clear the intent of the 1934 and 1936 Acts."

Conclusion.

The partnership sections of the Internal Revenue Code of 1939 as amended provided a clear formula in Sections 181, 182 and 183 thereof, which the taxpayers herein followed. The consequence of that formula when the ambivalent nature of 117(j) was applied to it in terms of more or less taxes should not control this court's interpretation of the statutes involved. The Commissioner adopted substantially the same position as taxpayers here in the *Lamont* case, *supra*, at page 5, where the consequence was more revenue to the Government. The United States Supreme Court in the *Neuberger* case, dealing with a prior Revenue Code which was silent as to the *parts* of partnership income which were to be included in the individual partner's computation of his net income, resolved the problem in favor of the taxpayer. If there were any doubt in the case at bar, that doubt should be resolved in favor of the taxpayer in view of the prior decisions and the fact that we are dealing with the imposition of additional taxes on taxpayers.

We respectfully urge that in view of the Internal Revenue Acts, beginning with the 1932 Act, the legislative history of said acts, the *Lamont* case, and the United States Supreme Court decision in *Neuberger v. Commissioner*, that this Honorable Court should reconsider its opinion rendered herein and grant respondent's Petition for a Rehearing.

Dated, 11th day of May, 1956.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that I am one of the counsel for respondents and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, May 11, 1956.

DUDLEY K. WRIGHT,

Attorney for Respondents and Petitioners.

No. 14793

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES A. RYNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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the endorsement to be forged. The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on the District Court's original jurisdiction "of all offenses against the laws of the United States."

The defendant pleaded guilty to both counts and, on March 23, 24 and 25, 1955, a Court trial was had upon the above indictment, the Honorable Ernest A. Tolin, Judge Presiding. On April 18, 1955, a Memorandum of Decision was filed finding the defendant guilty as charged. On said date a Judgment and Commitment was also filed sentencing the defendant to nine months on each count, sentences to run consecutively.

Subsequently, on April 25, 1955, a notice of appeal to this Honorable Court was filed and the United States District Court granted appellant an order to proceed on appeal in *forma pauperis*. Thereafter, a statement of points and authorities and a designation of record were filed and an order was made by this Court, pursuant to application of the appellant, granting leave to prosecute the appeal upon a typewritten record.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II.

THE STATUTE INVOLVED.

The indictment was brought under Section 495 of Title 18, United States Code, which provides in pertinent part as follows:

“Whoever falsely . . . forges, . . . any . . . contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

“Whoever utters or publishes as true any such . . . forged . . . writing, with intent to defraud the United States, knowing the same to be . . . forged . . .

“Shall be fined not more than \$1,000 or imprisoned not more than ten years, or both.”

In this case the allotment check which is set forth in the indictment was issued under the provisions of Public Law 771, 81st Congress [Rep. Tr. p. 4], Title 50, App., Secs. 2201 to 2216 and Title 36, Secs. 231, *et seq.*, and Regulations issued by the Secretary of the Air Force thereunder. These regulations are contained in the Air Force Manual and those particularly relating to Class “Q” allotments were received in evidence as Government’s Exhibit 23 without objection by the appellant. [Rep. Tr. pp. 121, 122.] Because of the length of the Code Sections and the Regulations, they will not be quoted verbatim in this part of the appellee’s brief but the pertinent sections will be set forth hereafter in the argument.

III. ARGUMENT.

A. The District Court Properly Allowed Appellant's Legal Wife to Testify Against Him as a Witness for the United States.

The Government respectfully submits that the District Court did not err in denying appellant's motion to strike the testimony of Hazel R. Ryno and that the following authorities fully support that position as a matter of law.

The District Court below held in *United States v. Ryno*, 130 F. Supp. 685, at p. 688 that "upon the trial of a defendant accused of forgery of a check by signing the name of another thereto, the prosecution must prove that the defendant was not authorized to sign such name, and until this proof is made, it is not shown to be a false instrument, and the defendant is not put to his proof at all."³

At the trial the Government offered evidence to prove that the defendant Charles A. Ryno forged the name of the payee on the check set forth in the indictment and thereafter cashed it without the consent of said payee. The direct testimony of his wife, Hazel R. Ryno, to whose order the check was drawn, was offered and admitted by the Court over the objection of the defendant. However, additional evidence independent of the wife's testimony, was also received which it is submitted was sufficient alone to establish the absence of any express authorization for the above action. This latter contention urged by the Government, as well as the appellant's proposition that, at any event, the defendant had "authority by opera-

³*People v. Lundin*, 117 Cal. 124, 48 Pac. 1024.

tion of law” to endorse and cash the check without committing any offense, will be discussed herein after the subject of privilege has been considered.

Curiously enough, although the privilege claimed in this case has been dealt with extensively, counsel for the parties to this proceeding have been able to find scant authority relating it to the precise facts in this proceeding. The one case which has been found dealing with federal law and which involves a forgery is distinguished herein because of the facts involved. However, there is an abundance of language in the cases cited which we believe is more than adequate to demonstrate the present proper application of the law to our facts as a result of an obvious progression over the years, particularly since 1935, in the thinking of the courts on this subject. There are several excellent discussions of the rule of privilege preventing one spouse from testifying against the other, together with its exceptions, in the cases, which, of course, are not set forth entirely in this brief. However, pertinent portions thereof are contained herein which it is believed accurately reflect the trend of the law and its contemporary status. None of the quotations, it is felt, have been changed in meaning by being taken out of context and they emphasize rather than detract from the gist of the opinions. They are all set forth for the convenience of the Court in having at hand in one document what appears to this writer to be particularly apt and relevant language from many of the cases.

Over the past 20 years the application of the common law rule mentioned above has understandably changed and expanded in the light of constantly developing standards of wisdom and justice. Mr. Justice Sutherland in

the case of *Funk v. United States*, 290 U. S. 371, phrased it in this fashion, at page 381:

“The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And, since experience is of all teachers the most dependable, and since experience is also a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth, should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.”

Thus, it is felt that a brief review of the authorities during the past few decades should be most helpful in determining whether the District Court properly admitted the testimony of Hazel R. Ryno “in the light of reason and experience,” as set forth in Rule 26 of the Federal Rules of Criminal Procedure.

As early as January 7, 1918, in *Rosen v. United States*, 245 U. S. 467, we find the Supreme Court of the United States stating the “modern” rule of 37 years ago relating the competency of witnesses convicted of crime. A co-defendant had pleaded guilty of forgery and was afterwards called as a witness for the Government. An objection was made by the defendant on trial that the witness was not competent to testify as he had previously pleaded guilty in a state court to the crime of forgery and had served his sentence. The Court held the witness competent, “Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime,

proceed upon sound principle. We conclude that the *dead hand of the common law rule* of 1789 should no longer be applied to such cases as we have here, * * *” (Emphasis added.) Previously on pages 470 and 471, the Court gave its reasons for the holding:

“Accepting as we do the authority of the later, the *Benson Case*, rather than that of the earlier decision, we shall dispose of the first question in this case, ‘in the light of general authority and sound reason.’

“In the almost twenty years which have elapsed since the decision of the *Benson Case*, the *disposition of courts and of legislative bodies to remove disabilities from witnesses has continued*, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, *leaving the credit and weight of such testimony to be determined by the jury or by the court rather than by rejecting witnesses as incompetent*, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.” (Emphasis added.)

While the *Rosen* case obviously did not involve the same privilege claimed in this case with the respect to the competency of the witness, the language used is clearly pertinent since it shows the disposition of the Supreme Court of the United States even at that early date to remove disabilities from witnesses rather than to exclude their testimony. In fact, on page 470, the Court in discussing *Benson v. United States*, 146 U. S. 325. decided

in 1892, noted that that case pointed out a great change had taken place even in the preceding 50 years, that is, since 1842, in the disposition of the courts to hear witnesses rather than to prevent them from testifying.

On December 11, 1933, 15 years later, an important step in this phase of the law was taken in the case of *Funk v. United States*, *supra*, 290 U. S. 365. Again, the precise issue was not identical with the question in the instant matter, but the expressions of the Court in this opinion are most revealing of the continuing changes of the application of the rules of privilege relating specifically to husband and wife.

The sole inquiry in the *Funk* case was whether in the United States District Court the wife of a defendant in a criminal case could be a competent witness *in his behalf*. The opinion held that the wife was not an incompetent witness for the defendant. On page 376, the Supreme Court again quoted with approval from the earlier *Benson* case, *supra*, as follows:

“But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were rules sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction. * * *

“Legislation of similar import prevails in most of the States. The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of

the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.”

On page 377, the Court quoted from the *Rosen* case, *supra*, which is set forth above and which case was tried 25 years after the *Benson* matter. On page 379, the Court stated as follows:

“With the conclusion that the controlling rule is that of the common law, the *Benson* case and the *Rosen* case do not conflict; but both cases reject the notion, which the two earlier ones seem to accept, that the courts in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions.”

On page 380, the Court went on to say:

“The conclusion which the court reached was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the *great weight of judicial authority* which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law *was within the power of the courts to declare and make operative*. (Emphasis added.)

* * * * *

“The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and

in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted. The exclusion of the husband or wife is said by this court to be based upon his or her interest in the event. *Jin Fuey Moy v. United States, supra*. And whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of the marital relationship, makes little difference. In either case, a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.

“Nor can the exclusion of the wife’s testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. *It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions, and in the*

light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another. *Patton v. United States*, 281 U. S. 276, 306. (Emphasis added.)

* * * * *

“It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but *if Congress fails to act*, as it has failed in respect of the matter now under review; and the court be called upon to decide the question, *is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?* That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the *Benson* and *Rosen* cases. (Emphasis added.)

* * * * *

“To concede this capacity for growth and change in the common law by drawing ‘its inspiration from every fountain of justice,’ and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a ‘flexibility and capacity for growth and adaptation’ which was ‘the peculiar boast and excellence’ of the system in the place of its origin.” (Emphasis added.)

Two years later on December 9, 1935, the Tenth Circuit in *Yoder v. United States*, 80 F. 2d 665, handed down a decision which the Government urges is persuasive authority for its position although the charge was dissimilar and the basis of the decision was thought to be dictum by the court in *United States v. Walker, infra*, 176 F. 2d 564 at page 568. The appellant was convicted of transporting a female in interstate commerce for immoral purposes. The prosecuting witness testified that she and the defendant drove to Chicago together and the defendant testified that they both talked to his lawful wife about the trip before leaving. In rebuttal, the Government called his wife, who divorced him after the above trip and before the trial. She testified she was not home on the day of the alleged conversation and had never met the prosecuting witness. The Court of Appeals held this testimony was rightly admitted. After a review of the competency of witnesses "from the dawn of common law," it was stated at page 668:

"These statutes, and the decisions of many courts which might be cited, indicate a *clear and decided trend toward removing the bar of incompetency from witnesses as such*; that we are moving steadily in the direction of allowing the trier of the facts to hear all the evidence, the interest or relationship of the witness to the parties being given due consideration in weighing its value. *The trend is in the right direction*, for we can see no reason why Mrs. Yoder should not testify that she was in Seminole, and not Shawnee, on a certain day, and that she did not know Mrs. Young; nor can we see any reason why Yoder, who testified to the contrary, should have the privilege of excluding her testimony." (Emphasis added.)

It is interesting to note that the holding in this case was based upon the trend toward removing the bar of incompetency altogether and not upon the ground that the divorce had made testimony admissible. (So stated Justice Clark in *United States v. Mitchell*, 137 F. 2d 1006, at page 1009—"Judge McDermott rested the Court's decision on the broader ground of the wife's competency.")

A few months before the *Yoder* decision, the case of *Paul v. United States* was decided in the Third Circuit on September 20, 1953, at 79 F. 2d 561. It involved a charge of forgery of a Government check and the defendant contended on appeal that the husband should not have been allowed to testify against his wife, a defendant. The Court made the flat statement that the common law rule had not been relaxed as to permit a husband to testify against his wife, and that was the extent of the holding. There was no discussion as to whether or not the particular facts were within the exception of a crime against the property of a spouse which is recognized by some authorities. On that basis it appears that it would be easily distinguishable on the facts from the present case. In the *Paul* matter, the witness Reed was not the victim of a crime against his property or person. The Court in its discussions of the evidence on page 563 stated that the jury had found neither of the defendants had forged the check and that under the circumstances the only one who could have placed his endorsement thereon was the witness—husband, Reed.

The defendant wife and Reed had lived separately since 1927 and in that year he had applied the entire amount of a first loan of \$296.00 against a United States Navy bonus to reduce support arrearages. Later in 1932, a

further support order was made in her favor against him and contempt proceedings had begun but were adjourned on the condition that Reed secure a second bonus loan and liquidate the balance due. Accordingly, he had received a second loan of \$472.72. At his instance, the check had been sent to his wife at her address so that she could see that it had been actually issued. She sent it back to him and it was returned to her with his purported endorsement on it. The question was whether or not the endorsement was forged. Not only had the arrangements been made to give her the check because of the pending contempt proceedings but the Court stated at page 563:

“Further, Mrs. Reed had the unendorsed check and sent it to her husband for endorsement. What reason could there have been for him to return it to her unendorsed? * * * All the evidence in the case and every reasonable inference to be drawn from the evidence indicate that Reed himself endorsed this check, just as he did the former check for \$296.00 in order to apply it to the order for the support of his wife and son, as he had promised to do, so as to prevent further contempt proceedings. * * *

In other words, it very much appears that the facts do not support a case within the recognized exception that the spouse may testify where a crime has been committed against his or her property.

In *Bruner v. United States*, 158 F. 2d 281, a case from the Sixth Circuit on June 1, 1948, the question of the competency of a wife to testify against her husband was again raised. The Court set forth the common law rule and only seems to recognize the exception relating to personal injuries. Noting the *Paul* and *Yoder* cases as

conflicting, the Court based its decision of the incompetency of the witness on *United States v. Graves*, 150 U. S. 118, decided on November 6, 1893. However, it is again clear that in both the *Bruner* and *Graves* cases the wives were not victims who had suffered any injuries whatsoever, personal, mental or property-wise, as a result of the alleged offenses.

Later, in the case of *United States v. Walker*, 176 F. 2d 564, which opinion has handed down by the Second Circuit on July 25, 1949, the defendant was convicted of transporting money in interstate commerce which had been taken feloniously by fraud. The gravamen of the charge was the obtaining of two large sums of money from a woman after the defendant had inveigled her into marrying him, even though he was already married to another. Actually, the defendant had previously defrauded two other women in the same manner of close to \$50,000.00, marrying the first and then going through a form of marriage with the second. The testimony of the first woman, who was his legal wife according to the court's statement, as well as the second victim, was admitted upon the issue of defendant's fraudulent intent. The Court reversed his conviction because of the admission of the testimony of his lawful wife. At page 568, the question of privilege was discussed and it was stated, after citing the *Yoder*, *Paul* and *Bruner* cases, that "* * * the question is still open in point of authority." Then the Court admitted that "it is always a debatable question how far any relevant evidence should be privileged. It deprives the party against whom the privilege is invoked of access to the truth, and a disclosure of the whole truth should be the prime concern of a court of justice." However, the Court went on to take a

position in which he appears to be standing alone, particularly in view of the language of the Supreme Court in the *Funk* case at page 380:

“Whether in a given situation the interest of the privileged party in suppressing the truth, ought to outweigh that concern would seem to be a matter for Congress and not for the courts.”

The opinion reads on to propose a consideration which it is believed has been rejected by a majority of the courts and particularly by Judge Tolin in the case below. First, the Court stated with respect to the impact of the testimony of one spouse against the other, “although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overture of reconciliation than the memory of what will ordinarily rankle as treachery.” Secondly, it was stated the question of whether the marriage had been so far wrecked that there is nothing to save “will introduce a collateral inquiry likely to complicate the trial seriously.” The Court goes on to state on the same page that “We do not forget that a wife from the earliest times was competent to testify against her husband when the crime was an offense against her person; and we have ourselves extended the exception to the crime of transporting her as a prostitute in interstate commerce, as has the Tenth Circuit. “* * * The basis of the exception has always been its ‘necessity’; for it was argued that, when the wife was the victim, the prosecution must fail without her testimony. That is not true when her testimony is only corroboratory or confirmatory of an offense against another person, even though it was an offense of the same character as that

for which she herself has suffered. * * * But there is no reason to suppose that it could not have secured a conviction in the case at bar, had the *Walker* testimony been excluded.”

The attention of this Court is particularly invited in the *Walker* case to the *dissent* of Circuit Judge Clark who wrote the earlier opinion of *United States v. Mitchell*, *infra*, 137 F. 2d 1006. In the opinion of this writer, it would be difficult to find a decision which has the forcefulness and impact of Judge Clark’s dissent (which was reported in the opinion below by Judge Tolin). To facilitate a comparison of its language with the other cases cited herein, it is set forth almost entirely as follows:

“Admittedly the common-law principle, that ‘a wife cannot be produced either for or against her husband, “*quia sunt duae animae in carna una*,”’ Co. Litt., f. 6b, 1628, is gone; indeed, there is none now so poor as to do it reverence. But I think we tend to overlook the fact that our duty to interpret ‘the principles of the common law’ in the light of ‘reason and experience,’ Federal Rules of Criminal Procedure, rule 26, compels us to discover anew a rational rule, and that a rule looking at least halfway toward the past is itself a new embodiment of the law without, however, the gain of being a real adjustment to modern life. In this instance, therefore, I prefer the forthright approach of a great American judge, McDermott, J., speaking for unanimous court in *Yoder v. United States*, 10 Cir., 80 F. 2d 665, and placing his decision by preference on this very point.

“For present purposes, however, the issue may be narrowed, as it is in the last paragraph of the opinion. For we really have to do with the exception,

recognized even at common law, of a wife's testimony as to her husband's crimes against herself. Since it is said quite properly that this exception 'probably extends' to the privileges against the admission of confidential communications, 8 Wigmore on Evidence, §2338, 3d Ed. 1940, I assume no special note need be taken of the defendant's letter of March, 1947, beyond the wife's testimony generally—even if the lack of exception to this bit of evidence is overlooked. And that this was a crime more against the wife's property than her person does not seem to be stressed and is not ground for a sound distinction. 8 Wigmore on Evidence, §2239, 3d Ed. 1940; A. L. I. Model Code of Evidence, Rule 216(c). Hence we find exclusion here limited to the single point that the wife was not the victim of the frauds for which the defendant was being tried. I submit that this is not a necessary deduction, or one grounded in 'reason and experience,' from that very vague and troublesome concept so criticized by Wigmore, *op. cit.* of 'necessity.' For no attempt is ever made actually to determine whether the wife's testimony is really necessary to the prosecution's (not her) case, as of course none can well be made. Often the testimony of the victim herself may not be absolutely necessary for conviction; on the other hand, testimony of successive defraudings of innocent women, as here, may be the very evidence to place the case beyond dispute. *Why should we not face it boldly that this vague label is but one of those judicial flourishes indulged in by judges to cover up a retreat from the impossible position to which Lord Coke's doctrine would otherwise have pushed them?*

"Should we not therefore turn to the only solid ground—if any—for the exclusion, namely, the promotion of marital peace, etc.? Wigmore, *op. cit.*

But then we must recognize that the reason for the exclusion is now gone entirely, put an end to by the husband's acts. And it will not be a difficult task, or a collateral excursion, for the judge to determine that fact, as did the judge here quite quickly. Certainly it is not any more difficult to conclude that the marriage is already wrecked in such case than in the one where the prosecutor contemplates making the wife his star witness and frames the indictment accordingly. There seems little difference between the situation where she shows herself ready to testify to the exact charge, and that where, as here, she is ready to support a Chinese copy of it. I think that the Judge's ruling below, made after careful hearing and argument, faced modern realities in the spirit invoked in *Funk v. United States*, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed 369, 93 A. R. R. 1136, and now embodied as a mandate in F. R. Cr. P. 26. I would affirm." (Emphasis added.)

Previously on July 26, 1943, the Court of Appeals for the Second Circuit considered this privilege. In *United States v. Mitchell*, 137 F. 2d 1006, the defendant was convicted of transporting his own wife in interstate commerce for the purpose of prostitution. Judge Clark who wrote the *Walker* dissent, *supra*, six years later, also handed down the opinion in this case. It was held that the lower court committed no error in the admission of the wife's testimony against the defendant. However, here the case was held to be directly within the "famous exception for necessity" recognized in *Lord Audley's* case, Hut. 115, 3 How. St. Tr. 401, where the husband had instigated rape against his wife. However, at pages 1007 and 1008, he stated as follows:

"In considering the admissibility of the wife's testimony, distinction must be made between a gen-

eral privilege prohibiting testimony by one spouse against another and the special privilege as to confidential communications. The latter seems quite thoroughly recognized and approved in this country, 8 Wigmore on Evidence, 3d Ed. 1940, §§2332-2341, whereas the former, while also widely recognized except where modified by statutes or limited by exceptions, has been strongly criticized as of obscure origin, uncertain rationalization, and unfortunate results in limiting judicial search for the truth. Wigmore, *id.* §§2227-2245, especially §2228, quoting Jeremy Bentham's devastating blasts at the rule, and §2245, expressing the hope that 'before the centenary of Bentham's death, no vestige of the privilege will remain.' It is omitted from the American Law Institute's Model Code of Evidence, although the privilege for confidential communications is retained."

An excellent and extensive review of the privilege involved herein is contained in a case handed down six years later from the District Court in Michigan on November 8, 1949. In *United States v. Graham*, 87 F. Supp. 237, the situation was one where within a period of "thirty romantic days" the defendant by blandishment and fraudulent means inveigled the victim to marry him and give up to him thereafter her entire estate. The precise question was whether a wife may be permitted to testify against her husband in a criminal prosecution where a crime has been committed against her by felonious taking of her property. Although in this case the marriage to the witness wife was part of the scheme to defraud her of her property, where in the present case the original marriage was no doubt made in good faith and thereafter deserted by the husband, the language

is still persuasive in showing the development of the exception to cover a somewhat similar situation. The Court on page 239 quoted the pertinent provisions of Rule 26 of the Federal Rules of Criminal Procedure and also the basic compelling considerations for the preparation of the rules as follows:

“The great objective of the criminal law is that justice be done. The guilty not to escape and the innocent must be in no danger of unjust conviction. In addition it is a tradition of Anglo-American jurisprudence that the defendant be fairly tried. The rules therefore must be drawn to safeguard the innocent, to facilitate the prosecution and speedy conviction of the guilty, without sacrificing fundamental principles of justice and fair play.”

On page 240, the Court stated the question as follows:

“With such a background how shall the common-law rule be applied in this case, where a wrong is committed by a husband against his wife’s property? It may be more proper to ask, shall the existing exception to the rule be interpreted to make the testimony admissible, and if the answer is in the negative, shall the exception be enlarged to admit the testimony?

* * * * *

“The ancient legal doctrine of the identity of husband and wife has long become obsolete. Modern legislation and the realities of present day life have effectively destroyed what undoubtedly at best was but a legal fiction. In practically all states today a wife may own, manage and control her separate property and with few exceptions has had given to her by statute most of the contractual powers which she did not have under the common-law rule. * * *

Though the several states have not been uniform in the extent of their modifications of the common-law rules, in none of them today does a married woman remain entirely under the legal blackout created for her by the common law, * * * *.

* * * * *

"* * * in twenty states all restrictions as to competency have been removed, and in those states which continue to uphold exclusion, twenty-two of them provide for an exception in the case of 'a crime committed by one against the other.' Three of these make express provision for the testimony of spouses where a crime has been committed by one against the person *or property* of the other. In others the 'crime committed by one against the other' has been construed to include any crime, whether of violence to the person or one affecting the property of the injured spouse.

* * * * *

"Shall a married woman be permitted to own, manage and control substantial property and be restricted in her right to protection against one who would wrongfully take it from her, on the sole ground that the law recognizes him as her husband? *Shall it be said that a husband is protected in the felonious taking of his wife's property by an ancient rule of the common law which permits her to testify against him only where her person is endangered or, as extended by judicial interpretation, where her morals are concerned? 'The light of the reason and experience' should resolve this question in the negative.* Wigmore on Evidence, Sec. 2239, Vol. 8, 3rd Ed.; American Law Institute, Model Code of Evidence, Rule 216c.

“Nor ought this view to be outweighed by a consideration of the basic reason for the common-law rule for the exclusion of the wife’s testimony, namely, the preservation of domestic tranquility and happiness. We have here but the formalities of a marriage which was nothing but a mask and device to cover the fraud which the husband perpetrated upon his wife. When the defendant fraudulently obtained her property and then promptly deserted her, he destroyed the very basis for the rule *by his own actions*, and *the court should penetrate the fiction that there was any marital status to preserve.*” (Emphasis added.)

It is with considerable interest that this writer noted a quotation from Wigmore in the next paragraph as follows:

“It is agreed by some legal writers that the rule prohibiting husband and wife from testifying against each other has long outlived its usefulness and that in the interests of justice, the court should be permitted to hear all of the evidence. Wigmore states it thus: ‘This privilege has no longer any good reason for retention. In an age which has so far rationalized, depolarized and dechivalrized the marital relation and the spirit of Feminity as to be willing to enact complete legal and political equality and independence of men and women, this marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.’ 3rd Ed., Vol. 8, Sec. 2228, p. 232.”

While this writer, in spite of her position as an active advocate, fervently hopes that the spirit of femininity has not (and will not ever be) completely de-chivalrized and we are perhaps only dealing here with what appears to

be an exception to the general rule of privilege, rather than a contention the rule itself should be abolished as a mere anachronism, the quotation exemplifies the advanced position some writers are willing to take.

In the *Graham* case, the Court concluded that even if an Appellate Court is loathe to accept the view that the privilege has long outlived its usefulness and prefers to sanction exceptions to the common law rule only “where exceptional circumstances are present” (citing the *Bruner* and *Walker* cases) there were such circumstances present in that case. At page 241, the Court held finally:

“There are exceptional circumstances in this case. Without his wife’s testimony, law and justice would be flouted by the defendant, and the safeguards sought to be established by the common-law rule would simply be translated into a *license* permitting him to *steal from or commit such other wrongs against her property as might suit his fancy.*” (Emphasis added.)

Subsequently on March 11, 1953, the Court of Appeals for the Fifth Circuit in *Pereira, et al. v. United States*, 202 F. 2d 830, decided a case similar in nature to the *Graham* matter, *supra*. The defendant had been found guilty of a violation of the mail fraud statute, a violation of the National Stolen Property Act and a conspiracy charge. The victim of the defendant’s activities was a woman whom he married a few weeks after their first meeting. She was defrauded by him of a considerable amount of money and divorced him after the indictment was returned, but before trial of the case. Her testimony was admitted over objection of the defendant that she was not a competent witness on matters which transpired

during the marriage. The Court of Appeals affirmed and held at pages 834 and 835, the wife was a competent witness because of the fact that the marriage had been dissolved by a decree of divorce prior to trial. However, it was stated at page 835, "the evidence went to show that, insofar as the defendant Pereira was concerned, the marriage relation was merely a sham and a pretense dishonestly assumed as a means of perpetrating a fraud, and he will not be permitted to use the relation to close the lips of the victim and to shield himself from the truth." This case was affirmed by the Supreme Court at 347 U. S. 1.

This Court is also referred to the case of *United States v. Lutwak* decided on April 16, 1952, by the Court of Appeals for the Seventh Circuit. The three petitioners for a rehearing were convicted of conspiracy to defraud the United States in connection with the immigration laws by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans under the so-called War Brides Act. The three veterans traveled to Paris, went through marriage ceremonies with the three aliens and then accompanied their new spouses to the United States in order to secure entry for the latter. It was part of the plan that the marriages were to be in form only and for the purpose of enabling the aliens to secure entry. The parties did not live together and they thereafter took necessary legal steps to sever the legal ties. In denying the petition for a rehearing on April 16, 1952, the Court of Appeals held that the so-called wives were competent witnesses. On pages 756-761, the Court quoted extensively from the various perti-

nent decisions such as the *Funk* case and went on to state:

“* * * The rules of evidence as defined in Rule 26, have shown an increasing tendency toward abolishment of incompetency in favor of admissibility, leaving the interest of the witness to the trier of the facts as bearing upon credibility. In other words, under the modern trend of thought in this country, the spouse, instead of being incompetent, is to be admitted as an interested witness, whose credibility is for the jury. This conclusion, we think, is the only one consistent with the reasoning of the Supreme Court in the decisions quoted and that of other courts. We conclude that, in view of the fact that Rule 26 of the Federal Rules of Criminal Procedure provides that the admissibility of evidence and the competence and privileges of witnesses shall be governed, in the absence of an Act of Congress, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience, and in view of the reasoning of the Supreme Court and other courts, we are justified in holding that, irrespective of all other questions, the wives were competent witnesses.”

Of course, the facts in that case are similar to those in the *Graham* matter and the marriages apparently were not entered into in good faith by one or both of the parties. However, the Court still went out of its way to show the increasing trend of abolishment of incompetency in favor of admissibility, rather than basing the decision on the fact that the original marriages were for the purpose only of securing entry into this country and that a *prima facie* case of invalidity had been presented.

At page 761 the invalidity of the marriages was discussed but the holding was still on the former ground.

On February 9, 1953, at 344 U. S. 604, the Supreme Court affirmed the decision of the Court of Appeals. At page 613 over to page 615, the Court considered the questions as to whether or not the wives were competent to testify against their "purported" husbands. The Court stated at page 614:

"Here again, we are not concerned with the validity or invalidity of these so-called marriages. We are concerned only with the application of a common-law principle of evidence to the circumstances of this case. In interpreting the common law in this instance, we are to determine whether 'in the light of reason and experience' we should interpret the common law so as to make these ostensible wives competent to testify against their ostensible husbands."

The Court here of course, was dealing with the situation at hand and had previously stated that if "the relationship was entered into with no intention of the parties to live together as husband and wife but only for the purpose of using the marriage ceremony in a scheme to defraud, the ostensible spouses are competent to testify against each other." However, the Court did make the above statement that it would not be concerned with the validity or invalidity of the so-called marriages, and went on to say on page 615:

"The reason for the rule at common law disqualifying the wife is to protect the sanctity and tranquility of the marital relationship. It is hollow mockery for the petitioners in arguing for the policy of the rule to invoke the reason for the rule and to say to us 'the husband and wife have grown closer together as

an emotional, social, and cultural unit' and to speak of 'the close emotional ties between husband and wife' and of 'the special protection society affords to the marriage relationship.' In a sham, phony, empty ceremony such as the parties went through in this case, *the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule.* 'It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.' *Funk v. United States, supra*, at 383. The light of reason and experience do not compel us to so interpret the common law as to disqualify these ostensible spouses from testifying in this case. We therefore hold that in the circumstances of this case, the common-law rule prohibiting antispousal testimony has no application. These ostensible wives were competent to testify."

Recently a case was handed down from the Fourth Circuit on March 7, 1955, entitled *Herman v. United States*, 220 F. 2d 219. There the defendant was convicted in the United States District Court of feloniously transporting in interstate commerce money and jewelry which he took from his elderly wife by fraud. This is a factual situation akin to the *Pereira* and *Graham* cases, *supra*. The marriage took place not long after the parties met and shortly before the swindle was consummated. In admitting the wife's testimony, the Court held at page 226:

"The ancient and outworn rule of common law that spouses are incompetent to testify against each other except in cases of personal violence has been relaxed in the federal courts. * * * Moreover,

it has been held in *United States v. Graham*, * * * a case precisely like that at bar, that a wife can be a witness against her husband not only when personal injury to her of a physical or moral nature is claimed, *but also where the crime affects her property*. We are in complete accord with this view which marks a normal development of the law of evidence and is in harmony with Rule 26 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., * * *” (Emphasis added.)

We also feel that the law in California and the statutes on this subject are persuasive authority. This state has at least two sections dealing with this subject. California Code of Civil Procedure, Section 1881 places a limitation upon both husband and wife except it provides:

“* * * nor to a criminal action or proceeding for a crime committed by one against the other
* * *”

The Penal Code, Section 1322 likewise contains an exception and provides for the competency of either spouse to testify in the following language:

“* * * or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage * * *”

There are several cases from this State which support the propositions announced by the above statute. See: *People v. Tidewell*, 141 P. 2d 969 (1943). It has been held in this State that on grand theft charge against a wife involving the drawing of checks on an alleged joint

tenancy bank account by the wife, that the husband is a competent witness to testify against such wife.

In the event this Court considers the privilege against disclosures of confidential communications between husband and wife involved in the within case, there follows a brief discussion of the Government's position in that regard. Originally, there had been little occasion for the judicial recognition of this privilege since the wider disqualification of the spouses of parties left very little possibility for the question of the former to arise. This was the reason the Court of Appeals in England denied there was any such common law privilege for marital communications. However, in the United States the courts have said that the statutes protecting marital communications from disclosure are declaratory of the common law.

Greenleaf in 1842 spoke only of "communications" and "conversations" when arguing for this privilege. Logically it appears that the privilege should be limited to expressions by words, oral, written or in sign language, or rarely, by expressive actions such as when a spouse would point out certain objects. A substantial number of courts such as the *Mitchell* case, *supra*, 137 F. 2d 1006, have held fast to this line of reasoning. Many courts, however, have construed various state statutes using the word "communications" to extend the privilege to actions and transactions not amounting to communications at all. This would seem to be unjustified, particularly in view of the existence of the general common law rule of incompetency of husband or wife testifying against the other.

At any event, the object of offering the testimony of Hazel R. Ryno was to prove a *lack* of communication with respect to authority to endorse and cash the check in question. Assuming the Court believes the general privilege should not be allowed at all or that this case involves an exception to the common law rule, then it is the Government's position that no part of her testimony would be barred by the privilege against disclosure of marital communications. The privilege originally was created to encourage marital confidences and here there was no communication at all involved. Further, the rule was that the communication must have been confidential which indicates that it was an overt act, not a lack of action, which was protected.

The privileges that attaches to confidential communications between husband and wife may be waived. The waiver belongs to the communicating spouse, the addressee of the communications not being entitled to object. (*Fraser v. United States*, 145 F. 2d 139 (6th Cir., 1954); Wigmore, Sec. 2340.) Assuming, *arguendo*, that lack of communication would come within this privilege, then Mrs. Kuna freely and voluntarily disclosed the situation on the stand and waived any such claim.

In *Holyoke v. Holyoke*, 87 Atl. 40, June 9, 1913, a case from the Supreme Judicial Court of Maine, an appeal from a probate decree was involved. The Court stated the basis for the general rule regarding confidential communications between husband and wife, “* * * *i. e.*, necessity to preserve the confidence which is essential to

the relationship of husband and wife. While there is some contrariety of opinion as to what constitutes a confidential communication, there is none as to the privilege when the confidence exists. 4 Wigmores on Evidence, §2336. But since the rule is based upon the necessity of preserving the confidence which must exist in order to create and maintain mutual happy relations and fulfill the * * * marriage, *we think it should not apply when the parties are living in separation * * **” (Emphasis added.) See also: *McEntire v. McEntire*, 140 N. E. 328, May, 8, 1923.

Conclusion.

Briefly stated, the Government urges on the following grounds that the testimony of Hazel R. Ryno was properly admitted although she was at the time of trial the lawful wife of the defendant.

Even though the precise factual situation involved herein does not appear to have been discussed in the cases relating to the claim of privilege, the modern rule followed by the majority of the courts, including the Supreme Court of the United States, has been to remove the barrier of incompetency from a husband or wife testifying against the other, rather than to exclude such testimony. The trend toward this rule has developed gradually for over a hundred years and by its application all of the relevant evidence is before the trier of facts so that in the interests of justice the whole truth can be ascertained.

Some courts have been unwilling to accept a complete abolishment of the privilege but prefer to sanction the exception to the rule where "exceptional circumstances" are present. It appears to be generally accepted that this occurs where the offense is a crime against the person *or property* of the spouses or where there is no longer any marital peace to promote.

In connection with the former, as will be shown in subsection (c) herein, the wife had a definite property interest in the check under the mandate of Congress.

With respect to the latter, as Judge Tolin stated in the decision below:

"When a man so far abandons the obligations of marriage as to leave his wife and enter into a long term adulterous relationship with another, even habitually holding out the paramour as his wife, it would be unrealistic for a court to say that to permit the wife to testify in a criminal case against him would wreck the marriage and should not be permitted. By abandonment of the marital duties and privileges, such a husband has also abandoned any right to assert a privilege to have his wife barred from giving testimony in a prosecution against him."

B. Lack of Authority Was Established by the Government Independently of the Testimony of the Defendant's Wife.

The Supreme Court of the United States in *Oppen v. United States*, 348 U. S. 84, recently considered on December 6, 1954, the extent of corroboration of admissions necessary as a matter of law for a judgment of conviction. The Court held:

“* * * the better rule to be that the corroborative evidence may not be sufficient independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce independent evidence *which would tend to establish the trustworthiness of the statement*.
* * * It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth.” (Emphasis added.)

Subsequently, on March 7, 1955, the Fourth Circuit in *Herman v. United States, supra*, 220 F. 2d 219, held as follows:

“Admissions may be used if there are corroborating circumstances which fortify the truth of the confession, although independently they do not establish the *corpus delicti* either beyond a reasonable doubt or by a preponderance of proof.”

Government's Exhibit No. 22 received in evidence [Rep. Tr. p. 182] was a written statement voluntarily executed by the defendant in the presence of a Secret Service Agent. [Rep. Tr. pp. 98-99.] In it the defendant admitted that he had “forged” the endorsement of his wife as the payee of the check in question. The witness had explained to the defendant that the word

“forgery” meant signing his wife’s name to the check without permission. [Rep. Tr. p. 101.] Thus the defendant knew before he signed the statement that the word “forgery” therein included the element of lack of authorities from the payee. Therefore, we have the defendant’s written admission that he had no authority from his wife to endorse her name. Further, the testimony was that the defendant specifically stated orally to the Agent that it was done “without her permission.” [Rep. Tr. p. 101.]

According to the *Oppper* and *Herman* cases if there is sufficient independent evidence aside from the admissions which *tends* to establish the *trustworthiness* of the statement, a judgment of conviction should be affirmed. This independent evidence does not have to establish the *corpus delicti* itself as contended by counsel for appellant.

It is felt that the following evidence is sufficient to fulfill the requirements of the above cases. Sergeant Herlihy first saw the defendant at the Allotment Division of the Air Force Finance Center in Victorville, California, on October 21, 1954 [Rep. Tr. p. 39] and showed him Exhibit 15, asking him to read it. It was a telegram referring to the confusion which had resulted over allotment checks for his lawful wife, Hazel R. Ryno [Rep. Tr. p. 44] and the defendant was asked by the Sergeant to come back as soon as possible with his wife to clear up the matter. The defendant did return to the base a few days later with a woman [Rep. Tr. p. 88] at a time when Ellen Wilcox was living with him [Rep. Tr. p. 136] and she was introduced to the Sergeant by the defendant as Hazel R. Ryno, his wife. [Rep. Tr. p. 45.] This woman was not Hazel R. Ryno, who testi-

fied at the trial. [Rep. Tr. pp. 84-86.] Sergeant Herlihy asked them for a copy of their marriage license and they stated it was not available then but that they would get it later for him. [Rep. Tr. p. 88.]

Ellen Wilcox testified that she had lived with the defendant since 1951, first in Denver, Colorado, before he went overseas. [Rep. Tr. pp. 127-128.] The defendant came back to Denver and they continued to live together for one month before he left for Victorville. [Rep. Tr. pp. 131-132.] She joined him at Victorville shortly thereafter and lived with him from February to November of 1954. [Rep. Tr. p. 136.] The defendant represented her to be his wife to friends [Rep. Tr. pp. 143-144] and she went by the name of Mrs. Ryno. [Rep. Tr. p. 147.] The defendant is the father of her two small children and she knew the defendant was married to Hazel R. Ryno. [Rep. Tr. p. 132.]

Obviously, when Sergeant Herlihy requested the defendant to come right back to straighten out the difficulties with the allotment checks, the latter tried to deceive him into believing his paramour was the lawful recipient. Can we say that this was the action of a person with authority to sign the name of the real payee, Hazel R. Ryno? All of the previously mentioned evidence definitely tends to establish the trustworthiness of the confession that he endorsed the check without her permission. Further, Exhibit No. 6 is a letter dated January 17, 1954, purporting to have been sent by the real Hazel R. Ryno from Denver, Colorado, to the Allotment Division for the Air Force in that city. [Rep. Tr. pp. 16-17.] It requested that in the future the checks for Hazel R. Ryno be sent to the Air Force Base at Victorville, Cali-

fornia, the defendant's address. The handwriting expert testified that the letter was in the defendant's handwriting. [Rep. Tr. pp. 106-109.] Taking into consideration the facts that the defendant was living with another woman in Victorville, and further, that he wrote a letter himself from that town, purporting to be not from him but from Hazel R. Ryno, attempting to get the checks transferred to his own address, it is felt that the requirements of the *Opper* and the *Herman* cases have been met. The above is also borne out by the fact that the business records for the Allotment Division in Denver, Colorado, Exhibit 4 [Rep. Tr. pp. 160, 14-15] showed a call was received in Denver on February 12, 1954, from Mrs. Ryno requesting information as to her January check since she had not received it. Pursuant to that call a change of address was made back to Denver, Colorado, Exhibit 8. [Rep. Tr. p. 19.] They were all government records admissible to show the truth of the occurrence to which they related.

Is it reasonable to assume that Mrs. Ryno in Denver, Colorado, would ask that her check be sent to Victorville when her husband was living there with another woman by whom he had had two children and then immediately ask that the checks be sent again back to Colorado? The resultant confusion of the defendant's efforts to have all of the checks sent to him and the real Mrs. Ryno's contacts with Colonel Miller's office attempting to have the checks redirected to her home show that something was amiss. As stated above, it is submitted that there is substantial independent evidence tending to support the truthfulness of the admissions made by the defendant.

C. Defendant Did Not Have Authority by “Operation of Law” to Endorse the Check in Question and Is Therefore Guilty of a Criminal Offense.

In Volume 37 of Corpus Juris Secundum, page 34, Section 3, the elements of forgery are set forth as follows:

“Subject to statutory variations, to constitute the crime of forgery, it is essential that three things should exist: (1) There must be a false making or other alteration of some instrument in writing, discussed, *infra*, section 5. (2) There must be a fraudulent intent, discussed, *infra*, section 4. (3) The instrument must be apparently capable of effecting a fraud, discussed *infra*, Section 14. Both the fraudulent intent and making must combine to complete the offense.”

On page 35, Section 4, it is further stated:

“The intent to defraud is not limited to obtaining money or property; it is sufficient if the forged instrument is to the prejudice of the *rights* of some person.” (Emphasis added.)

In *Quick Service Box Co., Inc. v. St. Paul Mercury Indemnity Co. of St. Paul*, 95 F. 2d 15, 7th Cir., February 16, 1938, the Court concluded on page 16 as follows:

“(2) We understand forgery to include the making or altering, with intent to defraud, of any writing or printing so as to cause the alteration or execution purport to be the valid act of a person, which it is not. Within its terms are the fraudulent making of words purporting to be what they are not *to the prejudice of others' rights*—the false making of material alteration, with intent to defraud, of any

writing which, if genuine, would be of legal efficacy *or* the foundation of legal liability.” (Emphasis added.)

It is clear that an *interference with the rights of others* is sufficient to support a charge of forgery. The Government further contends that this is true even where the other person is the spouse of the defendant. Further, we have not been able to find any case where it is held that the payee of a check must have a complete and unequivocal right to the proceeds thereof before a forgery of his or her name can be accomplished. The language used in defining forgery in all of the cases indicates to the contrary.

In this case the allotment check which is set forth in the indictment was issued under the provisions of Public Law 771, 81st Congress (see Title 50, App., Secs. 2201-2216, and Title 36, Sec. 231, *et seq.*) and regulations issued by the Secretary of the Air Force thereunder. The Act opens with the statement:

“To provide allowances *for dependents* of enlisted members of the uniformed services * * *.” (Emphasis added.)

Section 2204 pertains particularly to “Quarters, Allowances and Allotments of Pay.” It states in part:

“(h) The payment of the basic allowance for quarters provided in subsection (f) of this section for enlisted members with dependents shall be made only for such period as the enlisted member has in effect an allotment of pay not less than the sum of the basic allowance for quarters to which he is entitled plus \$40 (or in the case of enlisted members in pay grades E-4 and E-5, \$60; or in the case

of enlisted members in pay grades E-6 and E-7. \$80), for the support of the dependent or dependents on whose account the allowance is claimed."

Section 2206 further sets forth the following provision:

"§2206. Allowance and Allotment Without Consent of Enlisted Member.

"The Secretary concerned may, at his discretion, with or without the consent of the enlisted member concerned, authorize and direct the payment of the basic allowance for quarters and the establishment and payment of such allotment or allotments as he shall determine to be in conformity with the provisions of this Act (Sections 2201-2216 of this Appendix) for any enlisted member with dependents in any case in which such member does not claim such allowance. Sept. 8, 1950, c. 922, §6, 64 Stat. 796."

The Air Force in accordance with the provisions of the United States Code published an Air Force Manual, 173-20, Chapter 5, of which deals with Class "Q" allotments. As stated previously this portion of the manual was received in evidence as Government's Exhibit No. 23.

In Section II, Subparagraph 20515, it is provided that:

"The allotment will be payable *to* the dependent on whose behalf the basic allowance for quarters is claimed." (Emphasis added.)

In Section IV, Subparagraph 20532, it is provided:

"a. *To Whom Payable.* The allottee and the amount payable will be designated on DD Form 234. A class Q allotment must be made payable to or on behalf of a dependent or dependents listed

on the dependency certificate (DD Form 137, 137-1, or 137-2) and because of whose dependency the member will be entitled to increased basic allowance for quarters for dependents. Separate allotments will be made on behalf of each of the following categories of dependents, but generally will not be made for each of the dependents in the same category; Wife and/or children; child or children in custody of a divorced wife or other custodian; parent or parents.”

The very purpose of the Act was to get this money, part of which was a credit from the Government under subparagraph 20501 of Section I known as a “basic allowance for quarters for dependents” and part of which was a deduction from the Airman’s pay, into the hands of the dependents. This was no doubt a necessity based upon the propensity of many servicemen to inadequately support dependents. A diversion of such funds would certainly be prejudicial to the rights of dependents. It is clear that receipt of Class Q allotment checks was the *right* of the dependent since the allotment could be initiated on the request of a dependent even over the protest of the Airman. See subparagraph 20551 of Section V. The Airman can only stop the allotment on the death of the dependent, if a divorce has been attained or separation from service occurs. (See subparagraphs 20535 and 20536.)

Even if the defendant’s contention with respect to separate property could be sustained, which we do not believe is true, the Airman waived any right to these funds by voluntarily executing the application and authorizing the allotment to commence for his legal wife.

As Judge Tolin held in the decision below:

“The particular check was issued by the Government for a special purpose. It was never the purpose of a serviceman’s allotment that he be thereby personally enriched. It was the purpose of the Government to provide currently for the regularly recurring subsistence needs of the serviceman’s family. When defendant intercepted the check which was payable to his wife, and signed her name as endorser without her authority and for the purpose of receiving the funds for his personal use, he thereby acted fraudulently toward the Government and the wife, as well as all persons through whose hands the check would pass, and he committed the crimes charged in the Indictment.”

The above holding was supported by the case of *Wissner v. Wissner*, 338 U. S. 665, where the wife of a deceased serviceman sued to recover national life insurance benefits. The enlisted man subscribed to the policy while married to her and she was originally named beneficiary. However, due to an estrangement, he later named his mother and father as beneficiaries without her knowledge and consent. The lower State Court found that decedent’s army pay was community property under California law, was the source of premiums paid under the policy and directed judgment for the wife for one-half of the amounts of the payments. The Supreme Court of the United States held that the lower court’s decision was incorrect. In spite of state law governing wages acquired during the marriage relationship the Supreme Court held *that the controlling section was the one pro-*

mulgated by Congress involving the designation of beneficiary. It was stated at page 658:

“Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other. Pursuant to Congressional command, the Government contracted to pay the insurance to the insured’s choice. He chose his mother. It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who is the beneficiary Congress directed would receive the money.”

Of course the selection of a beneficiary for insurance is a different proposition from the designation of a beneficiary for support allowance and, as stated above, the latter can be started on the instigation of a dependent without the consent of an enlisted man. However, the *Wissner* case holds that, since Congress has spoken, its mandate could not be frustrated by the state community property law. The *Wissner* case went on to say:

“The end is a legitimate one within the Congressional powers over national defense, and *the means are adapted to the chosen end.*”

Here the chosen end was that the dependents, particularly wives and children, would receive support during the term of service and the means to insure that attainment under the code and the supplemental regulations were calculated to deposit checks in the hands of the dependents. There was no intent that the serviceman was to be “personally enriched” in any way and the system set up to distribute the allotments was designed

to protect the intended recipients of the funds primarily by having them named as payees in the check.

Since the allotment was issued for a special purpose, was to be payable to the dependent who could initiate its issuance even over the inaction of the serviceman, a dependent clearly had the right to the allotment check.

Thus, it is submitted that the defendant was not dealing rightfully with his own property as contended in appellant's opening brief.

Conclusion.

It is respectfully submitted to this Honorable Court that the Government for the above reasons has proved all of the elements of the offenses charged in the indictment and that the judgment of the District Court should be affirmed.

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No. 14794

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

STAR-KIST FOODS, INC. (formerly The French
Sardine Company of California),
Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Central Division

FILED

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PAUL P. O'BRIEN, CLERK



No. 14794

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

STAR-KIST FOODS, INC. (formerly The French
Sardine Company of California),
Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern
District of California. Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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BENNION,

STAFFORD R. GRADY,

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523 West Sixth Street,

Los Angeles, California,

For Appellee. [1*]

* Page numbers appearing at foot of original page of Transcript of Record.

In the United States District Court for the South-
ern District of California, Central Division

Civil Action No. 13867-WM.

THE FRENCH SARDINE COMPANY OF
CALIFORNIA, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR RECOVERY OF FEDERAL
CORPORATION INCOME TAX, DECLARED
VALUE EXCESS PROFITS TAX, EXCESS
PROFITS TAX AND INTEREST

Plaintiff complains of the defendant, and for a
cause of action alleges:

I.

That at all times hereinafter mentioned, the de-
fendant was and now is a sovereign body politic;
that the plaintiff at all times hereinafter mentioned
was and now is a corporation, organized and exist-
ing under the laws of the State of California, with
its principal place of business in the County of Los
Angeles, State of California, within the Sixth Col-
lection District of the State of California.

II.

That on or about July 29, 1948, plaintiff paid to
the Collector of Internal Revenue for the Sixth
Collection District of California at Los Angeles,
California, the sum of One Hundred Three Thou-

sand Six Hundred Twenty-Five Dollars and Eighteen Cents (\$103,625.18), hereinafter mentioned, [2] representing alleged deficiencies in income tax, declared value excess profits tax and excess profits tax, together with interest thereon; that on the date of such payment, Harry C. Westover, was the Collector of Internal Revenue in and for the Sixth Collection District of California; that said Harry C. Westover is not in office as such Collector of Internal Revenue at the time of the commencement of this action.

III.

That no action on the claim herein referred to has been taken before the Congress, or any of the departments of the United States, or in any Court; that no assignment or transfer of said claim has been made. That plaintiff is informed and believes, and on such information and belief alleges, that it is entitled to the amount herein claimed from the defendant and that there is no just credit or offset against said claim which is known to the plaintiff.

IV.

That on or about the 15th day of August, 1943, and within the time allowed by law, plaintiff duly filed for its fiscal year ended May 31, 1943, with Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth Collection District of California, a federal income and declared value excess profits tax return, Form 1120, showing an income tax of Seventy-Nine Thousand Three Hun-

dred Twenty-Four Dollars and Ten Cents (\$79,324.10), and a declared value excess profits tax of Fifty-Five Thousand Four Hundred Nineteen Dollars and Fifty-Nine Cents (\$55,419.59), and an excess profits tax return, Form 1121, showing an excess profits tax of Eight Hundred Twelve Thousand, Two Hundred Sixteen Dollars and Fifty-Three Cents (\$812,216.53), all of which taxes were duly paid within the time and in the manner required by law. That thereafter, on or about [3] January 28, 1947, as a result of an examination by agents of the Bureau of Internal Revenue, additional taxes were asserted against plaintiff and on or about July 29, 1948, plaintiff paid to Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth Collection District of California, additional corporation income tax of Ten Thousand Three Hundred Ninety-Six Dollars and Ninety-Two Cents (\$10,396.92), additional declared value excess profits tax of Twelve Thousand Seven Hundred Ten Dollars and Forty Cents (\$12,710.40), and additional excess profits tax of Fifty-Six Thousand Seven Hundred Seventy Dollars and Seventeen Cents (\$56,770.17), aggregating Seventy-Nine Thousand Eight Hundred Seventy-Seven Dollars and Forty-Nine Cents (\$79,877.49), together with interest thereon of Twenty-Three Thousand Seven Hundred Forty-Seven Dollars and Sixty-Nine Cents (\$23,747.69), or a total payment of One Hundred Three Thousand Six Hundred Twenty-Five Dollars and Eighteen Cents (\$103,625.18).

V.

That on or about October 14, 1949, plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California, a claim for refund, Treasury Form 843, for a portion of the aforesaid additional corporation income tax, declared value excess profits tax and excess profits tax, and interest paid by plaintiff; which claim was in the total sum of One Hundred Ten Thousand Twenty - Seven Dollars and Ninety - Nine Cents (\$110,027.99). A copy of said claim is attached hereto, marked "Exhibit A" and made a part hereof as though the same were written at length herein. That on or about February 20, 1947, plaintiff filed for the fiscal year ending May 31, 1943, with the Internal Revenue Agent in Charge, Treasury Form 872, waiver extending the period of limitations upon [4] the assessment of income and profits tax to June 30, 1948. Subsequently a second waiver, Form 872, extending the period of limitations upon the assessment of income and profits tax to June 30, 1949, was executed and filed with the Internal Revenue Agent in Charge at Los Angeles, California, or or about March 30, 1948.

VI.

That a period of more than six (6) months has elapsed since the filing by plaintiff of the aforesaid claim for refund, and plaintiff has received no notice from the Commissioner of Internal Revenue of any action taken with respect to said claim.

VII.

That in determining the aforesaid additional tax and interest, the Commissioner of Internal Revenue, by his agents, disallowed as a deduction from income the amount of Ninety-Seven Thousand Two Hundred Fifteen Dollars (\$97,215.00) which amount was paid by plaintiff on or about May 20, 1943, to the Treasurer of the United States, representing the amount plaintiff was alleged to have charged its customers in excess of General Maximum Price Regulations promulgated by the Office of Price Administration. Plaintiff is informed and believes, and on such information and belief alleges, that the aforesaid amount is deductible under the provisions of Section 23 (a) (1) (A) of the Internal Revenue Code in determining the taxable income of its fiscal year ended May 31, 1943, for corporation income and declared value excess profits tax and excess profits tax purposes.

VIII.

That in determining the aforesaid additional tax and interest, the Commissioner of Internal Revenue, by his agents, failed to allow plaintiff its post-war refund credit [5] of ten per cent (10%) of the additional excess profits tax determined, as required by Section 780 of the Internal Revenue Code. Plaintiff is informed and believes, and upon such information and belief alleges, that of the additional excess profits tax in the amount of Fifty-Six Thousand Seven Hundred Seventy Dollars and Seven-

teen Cents (\$56,770.17) which was determined, and paid by plaintiff, ten per cent (10%) thereof, or the sum of Five Thousand Six Hundred Seventy-seven Dollars and Two Cents (\$5,677.02) was erroneously and illegally collected.

IX.

That as a result of all of the foregoing, plaintiff's corporation income tax, declared value excess profits tax and excess profits tax for its fiscal year ended May 31, 1943, has been erroneously and illegally overassessed and collected in the aggregate amount of at least Eighty-Six Thousand Two Hundred Eighty Dollars and Thirty Cents (\$86,280.30), together with interest thereon in the amount of at least Twenty - Three Thousand Seven Hundred Forty-Seven Dollars and Sixty-Nine Cents (\$23,747.69); that said sums have not been refunded to plaintiff, and the whole thereof, together with interest thereon as provided by law, is now due and owing to plaintiff.

Wherefore, plaintiff prays for judgment against the defendant in the sum of One Hundred Ten Thousand Twenty-Seven Dollars and Ninety-Nine Cents (\$110,027.99), or such larger sum as may be found to have been overpaid by plaintiff, together with interest on the sum overpaid from the respective dates of overpayment, as provided by law, and

for such other and further relief as the Court may deem just and proper in the premises. [6]

Dated February 21, 1952.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

/s/ A. CALDER MACKAY,
/s/ By ARTHUR McGREGOR,

ROLAND G. SWAFFIELD
/s/ ROLAND G. SWAFFIELD,
Attorneys for the Plaintiff. [7]

Duly Verified.

EXHIBIT "A"

Form 843, Treasury Department, Internal Revenue
Service (Revised July 1947)

CLAIM

To be filed with the Collector where assessment was
made or tax paid.

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

[xx] Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

[Stamped]: Received Oct 14 1949 Coll. Int. Rev.
Los Angeles, Cal. Teller-C.

* * * * *

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
French Sardine Company of California.

Exhibit "A"—(Continued)

Business address: 181 Fish Harbor Wharf, Terminal Island, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: Sixth District of California.

2. Period from June 1, 1942, to May 31, 1943.

3. Character of assessment or tax: Income and Declared Value Excess Profits Tax and Excess Profits Tax.

4. Amount of assessment, \$988,092.38; dates of payment: During fiscal year ended May 31, 1944, and on or about July 29, 1948.

* * * * *

6. Amount to be refunded: \$110,027.99 plus interest thereon.

* * * * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached

The French Sardine Company of
California,

By Joseph J. Bogdonovich, President

Exhibit "A"—(Continued)

Subscribed and sworn to before me this 13th day of Oct., 1949.

(Seal) H. C. Newcomer, Notary Public.

I.

On or before the time required by law, or within a period of a legally granted extension thereafter, Claimant filed for the fiscal year ended May 31, 1943, corporation income and declared value excess profits tax return, Form 1120, showing an income tax of \$79,324.10 and declared value excess profits tax of \$55,419.59, or a total income and declared value excess profits tax of \$134,743.69; and a Form 1121, corporation excess profits tax return for the same fiscal period, showing an excess profits tax liability of \$812,216.53. All of the above taxes were paid during the fiscal year ended May 31, 1944, with the exception of \$38,745.33 of excess profits taxes deferred under Section 710 (a) (5) of the Internal Revenue Code, which amount has not been paid. No part of the above sums have been refunded to this Claimant.

II.

As a result of an examination of said returns by the Commissioner of Internal Revenue through his agent, the Internal Revenue Agent in Charge at Los Angeles, California, certain deficiencies were proposed by letter dated January 28, 1947, bearing symbols LA:30D. After protest and conference duly had proposed deficiencies with interest thereon, as

Exhibit "A"—(Continued)

indicated, were paid by Claimant on or about July 29, 1948, to the Collector of Internal Revenue for the 6th Collection District of California at Los Angeles, as follows: [9]

Corporation income tax	\$ 10,396.92
Declared value excess profits tax	12,710.40
Excess profits tax	56,770.17
	<hr/>
Total tax	79,877.49
Interest	23,747.69
	<hr/>
Total payment	\$103,625.18

No part of said total amount of \$103,625.18 has been refunded to this Claimant.

That both the Commissioner of Internal Revenue and the Claimant have consented in writing to an extension of time to June 30, 1949, within which income and excess profits taxes may be assessed for the year here involved.

III.

Said proposed deficiency was based in substantial measure upon the examining agent's erroneous action in disallowing as a deduction from income the amount of \$97,215.00 paid by Claimant to the Treasurer of the United States on or about May 20, 1943. The facts surrounding the said payment are as follows:

On or about April 28, 1942, the Office of Price Administration promulgated General Maximum Price Regulations which stabilized or froze all

Exhibit "A"—(Continued)

canned fish prices at the level of the highest prices at which each individual canner sold his products during the month of March, 1942. These regulations caused much confusion in the canned fish industry with variations in price on similar items as great as \$6.00 per case basis 48/1½'s. Fancy tuna could be sold at the time for almost any price which might be asked for it. [10]

Claimant believes and therefore alleges that Claimant's ceiling on fancy tuna was the lowest in the industry, namely \$11.00 per case, while other canners sold at prices as high as \$17.00 per case of 48/1½'s. There was no ceiling on raw fish and, as a result, some of the canners bid up the price of the raw product from a low of \$120.00 per ton to as much as \$250.00 per ton.

The Claimant in order to avoid transfers of its contracted boats to the high bidders, was forced to meet these prices. Mr. A. T. Williams, then Vice-President and Sales Manager of Claimant, constantly pressed the Office of Price Administration by telephone, telegraph, letters and personal trips to Washington for relief and clarification of the situation.

Relief in the form of a uniform ceiling for the industry did not come until January, 1943, but in the meantime the Head of the Fish Section, Food and Food Products Branch, of the Office of Price Administration in Washington, gave oral consent to an increase in price on canned tuna for Claimant of \$1.00 per case, and assured Mr. Williams that

Exhibit "A"—(Continued)

any complaints regarding the higher price would go over his desk and that he would take proper action to see that claimant was protected.

Claimant agreed in return that it would type the following notice on all invoices carrying the new price until such time as formal ceilings were declared:

"Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, [11] we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1½'s and \$2.00 per case on 48/1's, and will refund you accordingly.

French Sardine Co., Inc."

This was done on all invoices from approximately September 15, 1942, to about the middle of January, 1943, at which time formal ceilings were announced and these ceilings were exactly the same as the new prices charged by Claimant, that is, \$11.00 per case. The Office of Price Administration was advised of the proposed action in writing prior to the time when the change was made.

In April, 1943, investigators from the Los Angeles Office of Price Administration enforcement division checked records of sales which Claimant had made on the higher basis, and notwithstanding and under the protest of Claimant refused to approve the increase. Claimant offered to make the refund to its customers in accordance with the

Exhibit "A"—(Continued)

above notice, but this was objected to by the OPA enforcement officials.

Instead, the Office of Price Administration Officials insisted that the admitted liability to Claimant's customers be paid to the United States Government. They agreed that there had been no violation of the spirit, intent or purpose of the price regulations, but that by reason of a "technical violation", liability in the amount of \$1.00 per case arose to either the Government or the customer, and they insisted Claimant should make the payment directly to the Government as a "contribution to the war effort." Claimant was assured that the same was not [12] being extracted as a fine or penalty. Claimant sold on the above basis 97,215 cases. Accordingly, a check in the amount of \$97,215.00 was made out to The Treasurer of the United States and forwarded to the Los Angeles Office of Price Administration offices on May 20, 1943.

IV.

That the Commissioner through his examining agent in determining the proposed deficiency set forth in paragraph II hereof further erroneously failed to allow Claimant its post war refund credit of ten per cent of the additional excess profits tax determined as provided by Section 780 of the Internal Revenue Code. The amount of said additional excess profits is \$56,770.17, and the post war refund credit to which Claimant is entitled by reason of

Exhibit "A"—(Continued)

said erroneous action is the amount of \$5,677.02, all of which is refundable to this Claimant.

V.

As a result of the aforesaid erroneous action by the Commissioner through his examining agent, Claimant's tax for the fiscal year ended May 31, 1943, has been overpaid in the amount of \$86,280.30 and interest thereon in the amount of \$23,747.69 has been erroneously paid and collected. Computation of said overpayment is set forth in Schedule A, attached hereto and made a part hereof. The total amount of \$110,027.99 is, therefore, due and owing to Claimant and Claimant hereby respectfully demands that the said amount be refunded to it together with interest thereon as provided by law.

VI.

Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due it by reason of the foregoing or on account of (a) any mistake in fact or in law made by itself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of its said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department (d) any re-

Exhibit "A"—(Continued)

pealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered.

This is to certify that the undersigned prepared the foregoing claim for refund and that the statement of facts therein set forth is from information furnished by the taxpayer, which the undersigned believe to be true.

ARTHUR MCGREGOR,
F. EDWARD LITTLE,

Attorneys for Taxpayer, 728 Pacific Mutual Building, 523 West Sixth Street, Los Angeles 14, California. Michigan 5175.

ROLAND G. SWAFFIELD,

Of Counsel, 902 Farmers & Merchants Bank Building, Long Beach 12, California. [14]

FRENCH SARDINE COMPANY OF CALIFORNIA
FISCAL YEAR ENDED 5-31-43

Recomputation of Taxes. Showing Overpayment by Reason of Failure of Revenue Agent to Allow Deduction From Income of \$97,215.00 Paid O.P.A.

Declared Value Excess Profits Tax

Net Income Revised, per Conferee.....	\$ 1,266,136.28
Less O.P.A. Adjustment	97,215.00
	<hr/>
Less Credit 10% of \$6,000,000	600,000.00
	<hr/>
	568,921.28
	<hr/> <hr/>

Exhibit "A"—(Continued)

Tax on \$300,000.00 at 6.6%.....	19,800.00
Tax on \$268,921.28 at 13.2%.....	35,497.61
Revised Tax	55,297.61
Tax Paid	68,129.99
Tax Overpaid	12,832.38
<hr/>	
Normal and Surtax	
Net Income Revised, per Conferee.....	1,266,136.28
Less O.P.A. Adjustment.....	97,215.00
Declared Value Excess Profits Tax....	55,297.61
Capital Gain	19,819.68
Income Subject to Excess Profits Tax	881,888.75
	1,054,221.04
	211,915.24
<hr/>	
Normal and Surtax at 40%.....	84,766.10
Capital Gain Tax at 25%.....	4,954.92
Revised Tax	89,721.02
Tax paid	89,721.02
Deficiency	None
<hr/>	
Excess Profits Tax	
Net Income Revised, per Conferee.....	\$ 1,178,186.61
Less O.P.A. Adjustment.....	97,215.00
	1,080,971.61
Add—Reduction in Declared Value Excess Profits Tax	12,832.38
	1,093,803.99
Less Specific Exemption and Credit.....	211,915.24
Adjustment—Excess Profits Net Income.....	881,888.75
Tax at 90%.....	793,699.88
<hr/>	

Exhibit "A"—(Continued)

Surtax Net Income	1,113,623.67	
80% Thereof	890,898.94	
Less Income Tax	89,721.02	801,177.92
Lower of the two.....		793,699.88
Less Deferment—Section 710(a) (5)		38,759.51
Excess Profits Tax		754,940.37
Previously Paid		830,241.37
Tax Overpaid		75,301.00
Post War Refund of Excess Profits Tax		
Excess Profits Tax		754,940.37
Credit Allowable		75,494.04
Shown on Return		77,347.12
Reduction of Credit		1,853.08

FRENCH SARDINE COMPANY OF CALIFORNIA

FISCAL YEAR ENDED 5-31-43

STATEMENT OF DEFERMENT UNDER SECTION 710(a) (5)

Excess Profits Net Income Revised.....	\$ 1,093,803.99	
Less Specific Exemption	5,000.00	
Credit per Claim.....	337,418.64	342,418.64
90% Thereof		751,385.35
		676,246.82
Surtax Net Income	1,113,623.67	
80% Thereof	890,898.94	
Less Income Tax.....	133,994.50	756,904.44
Tax Applicable		676,246.82

Exhibit "A"—(Continued)

Deferment

Excess Profits Tax Without Regard to Section 722....	793,699.88
Excess Profits Tax After Application of Section 722.....	676,246.82
<hr/>	
Reduction in Tax.....	117,453.06
Deferment at 33%	38,759.51
<hr/> <hr/>	
Recapitulation of Tax Overpaid	
Overpayment Declared Value Excess Profits Tax.....	12,832.38
Overpayment Excess Profits Tax.....	75,301.00
Less Reduction in Post War Credit....	1,853.08
	73,447.92
<hr/>	
Subject to Refund.....	86,280.30

[Endorsed]: Filed February 27, 1952.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon (1) A. Calder MacKay and Arthur McGregor, of MacKay, McGregor, Reynolds & Bennion, and (2) Roland G. Swaffield, plaintiff's attorneys, whose addresses are (1) 728 Pacific Mutual Building, 523 West Sixth Street, Los Angeles 14, California, and (2) 902 F. & M. Office Building, 320 Pine Avenue, Long Beach 12, California, an answer to the complaint which is herewith served upon you, within sixty (60) days after service of this summons upon you, exclusive of the day of service. If you fail to

do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: February 27, 1952.

[Seal] EDMUND L. SMITH,
Clerk of Court
/s/ By L. CUNLIFFE,
Deputy Clerk [18]

Return on Service of Writ attached. [19]

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof, except that it is denied that the deficiencies were merely “alleged” deficiencies.

III.

Answering paragraph III of the complaint, defendant denies that plaintiff is entitled to the amount claimed from the defendant, and alleges

that defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph III.

IV.

Admits the allegations contained in paragraph IV thereof, except that it is alleged that the amount of the excess profits tax shown on the return and paid was \$773,471.20, rather than \$812,216.53. [20]

V.

Admits the allegations contained in paragraph V thereof, except that the allegations in the claim for refund are denied, except to the extent that similar allegations in the complaint are admitted in this answer.

VI.

Admits the allegations contained in paragraph VI thereof.

VII.

Admits the allegations contained in paragraph VII thereof, except that it is denied that the payment of \$97,215.00 is deductible in determining plaintiff's taxable income for its fiscal year ended May 31, 1943, for federal tax purposes.

VIII.

Denies the allegations contained in paragraph VIII thereof.

IX.

Denies the allegations contained in paragraph IX thereof, except that it is admitted that the sums mentioned have not been refunded.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

WALTER S. BINNS,
United States Attorney

E. H. MITCHELL and
EDWARD R. McHALE,
Asst. U.S. Attorneys

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue

/s/ E. H. MITCHELL,
Attorneys for Defendant [21]

Affidavit of Service by Mail attached. [22]

[Endorsed]: Filed Oct. 24, 1952.

[Title of District Court and Cause.]

PRETRIAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent

herewith, and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to, as follows:

I.

Plaintiff was incorporated under and by virtue of the laws of the State of California on November 20, 1917.

II.

Plaintiff filed a timely corporation income and declared value excess profits tax return (Form 1120) and a timely excess profits tax return (Form 1121) for the taxable year ended May 31, 1943, the taxable year involved in this proceeding, with the Collector of Internal Revenue for the Sixth District of California. [23]

III.

Plaintiff keeps its books and files its tax returns on the basis of the accrual method of accounting and on the basis of fiscal years ending May 31.

IV.

Plaintiff at all times here pertinent has been engaged in the fish cannery business and has maintained its offices and principal place of business at 181 Fish Harbor Wharf, Terminal Island, Los Angeles, California, within the jurisdiction of this Court.

V.

By its check No. 16577, dated May 20, 1943, plaintiff paid to the Treasurer of the United States \$97,-

215.00, representing the exact amount of certain alleged overcharges on the sale by plaintiff of certain of its products (canned tuna), i.e., single damages, in settlement of claims made against plaintiff by the Office of Price Administration.

VI.

On its tax returns (referred to in paragraph II above) for the taxable year ended May 31, 1943, plaintiff deducted the amount of \$97,215.00 as an ordinary and necessary business expense.

VII.

On January 28, 1947, as a result of an examination by agents of the Bureau of Internal Revenue, and in substantial part because of the disallowance of the amount of \$97,215.00 as a deduction, additional taxes were asserted against plaintiff.

* * * * * [24]

IX.

On October 14, 1949, plaintiff filed with Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth District of California, a timely Claim for Refund (Form 843) in the form and manner as required by law, claiming a refund due plaintiff in the amount of \$110,027.99, plus interest thereon as provided by law, in large part as a result of the disallowance of said \$97,215.00 as a deduction.

X.

Said Harry C. Westover resigned as Collector of Internal Revenue for the Sixth District of Califor-

nia, effective October 31, 1949, and was not in said office at the time this action was commenced.

XI.

A period of more than six months had elapsed since the filing of said Claim for Refund, on October 14, 1949, when the instant action was commenced by the filing of the complaint herein on February 27, 1952, and plaintiff had not then, and has not yet received any notice from the Commissioner of Internal Revenue that any action has been taken with respect to said Claim for Refund.

Schedule of Exhibits

It is hereby stipulated that the following documents are authentic and may be received in evidence without any foundation being laid and without prejudice to the rights of any party herein to object to their relevancy, materiality or competency:

1. Photostatic copy of "Complaint" in Civil Action No. 2960-BH entitled Prentiss M. Brown et al. vs. French Sardine Company, filed in this court on June 3, 1943.

2. Photostatic copy of "Stipulation" in Civil Action No. 2960-BH also filed on June 3, 1943.

3. Photostatic copy of "Judgment" in Civil Action No. 2960-BH also filed on June 3, 1943.

4. Photostatic copy of Maximum Price Regulation number 299, issued by Leon Henderson, Administrator of the Office of Price Administration, on January 7, 1943.

5. Telegram from French Sardine Company,

Inc., to Charles M. Elkington dated July 29, 1942.

6. Telegram to Charles M. Elkington from French Sardine Company, Inc., dated August 10, 1942.

7. Letter from the French Sardine Company, Inc., by A. T. Williams, to the Office of Price Administration, Los Angeles, California, dated September 2, 1942.

8. Letter to Charles W. Triggs from French Sardine Company, Inc., by Mr. Williams, dated September 24, 1942.

9. Letter from the French Sardine Company, Inc., by A. T. Williams, to Charles W. Triggs, dated November 6, 1942.

10. Letter from the French Sardine Company, Inc., by A. T. Williams, to Office of Price Administration, Los Angeles, California, dated November 16, 1942.

11. Letter from the French Sardine Company, Inc., by A. T. Williams, to Charles W. Triggs, dated November 16, 1942. [26]

12. Letter from French Sardine Company by A. T. Williams to Chas. W. Triggs, dated December 5, 1942.

13. Letter from French Sardine Company by A. T. Williams to office of Price Administration, Los Angeles, dated December 5, 1942.

14. Letter from French Sardine Company, Inc., by Mr. Williams to Charles W. Triggs dated April 29, 1943.

15. Letter from Charles W. Triggs to A. T. Williams dated May 6, 1943.

16. Letter from French Sardine Company, Inc., by Mr. Williams, to Charles W. Triggs dated May 6, 1943.

17. Letter from Charles W. Triggs to A. T. Williams dated May 19, 1943.

18. Letter from Charles W. Triggs to A. T. Williams dated July 7, 1943.

Dated: November 22, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant

MACKAY, McGREGOR,
REYNOLDS & BENNION

/s/ By ARTHUR McGREGOR,
Attorneys for Plaintiff

[27]

[Endorsed]: Filed Nov. 23, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL PRETRIAL STIPULATION OF FACTS

This supplemental pre-trial stipulation of facts will supplement that heretofore entered into by the

parties, dated November 22, 1954, and filed with the Court on November 23, 1954.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith, and without prejudice to their right to object to materiality or relevancy of any of the facts agreed to as follows:

I.

Attached hereto and marked Exhibit No. 1 is schedule showing the amounts of income, declared value excess profits tax and excess profits tax, and interest, which plaintiff has paid to the Collector of Internal Revenue for the 6th District of California for the fiscal year ended May 31, 1943, together with the dates of payment and the post war refunds and adjustments. [28]

II.

On the 24th day of April, 1953, at a regular meeting of the Board of Directors of The French Sardine Company of California, the name of plaintiff corporation was changed to Star-Kist Foods, Inc., by resolution approved by the shareholders of plaintiff corporation.

Schedule of Exhibits

It is hereby stipulated that the following documents are authentic and may be received in evidence without any foundation being laid and with-

out prejudice to the rights of any party herein to object to their relevancy, materiality or competency. The documents listed follow in numerical order those listed in the Schedule of Exhibits previously filed herein on November 23, 1954:

Photostatic copy of the following Price Regulations:

19. General Maximum Price Regulation issued April 28, 1942.

20. Maximum Price Regulation 237, issued October 10, 1942.

21. Maximum Price Regulation 184, issued July 23, 1942.

22. Maximum Price Regulation 209, effective August 31, 1942.

23. Maximum Price Regulation 247, issued October 24, 1942.

24. Maximum Price Regulation 252, issued October 30, 1942.

25. Maximum Price Regulation 265, issued November 9, 1942.

26. Maximum Price Regulation 277, issued November 28, 1942.

27. Maximum Price Regulation 366, issued April 13, 1943.

28. Copy of United States Corporation Income and Declared Value Excess Profits Tax Return (Form 1120) filed by plaintiff for the fiscal year ending May 31, 1943.

29. Copy of United States Corporation Excess Profits Tax Return (Form 1121) filed by plaintiff for the fiscal year ending May 31, 1943.

30. Copy of Claim for Refund (form 843) filed by [29] plaintiff on October 14, 1949.

Dated: January 5, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant

MACKAY, McGREGOR,
REYNOLDS & BENNION

/s/ By STAFFORD R. GRADY,
Attorneys for Plaintiff

[30]

[Endorsed]: Filed January 6, 1955.

French Sardine Company

Schedule of Income, Depleted Value, Excess Profits and Excess Profits
Taxes Paid and Post War Refunds and Adjustments for Taxation
Ended May 31, 1943

Date	Income Tax	Depleted Value Excess Profits	Excess Profits Tax	Total Tax	Interest	Total Tax and Interest
<u>Payments</u>						
August 12, 1943	*1983103	*1385490	*19336780	*22705373	*	*22705373
Nov. 15, 1943	1983103	1385490	19336780	22705373		22705373
Feb. 8, 1944	1983103	1385490	19336780	22705373		22705373
May 9, 1944	1983103	1385489	19336780	22705372		22705372
July 28, 1948	1039692	1271040	5677017	7987749	2286961	10274710
Oct. 19, 1951			3844264	3844264	1750720	5594984
Total Paid	*8972104	*6812999	*86868401	*102653504	*4037681	*106691185

Post War Credit Refunds and Adjustments

Dec. 2, 1946			(7734712)	(7734712)		(7734712)
Nov. 14, 1949			(567702)	(567702)	(88165)	(655867)
Oct. 19, 1951			(384426)	(384426)		(384426)
Total	*8972104	*6812999	*78131561	*93766664	3949516	*97916180

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Jan. 7, 1955, at Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge;
Deputy Clerk: John A. Childress; Reporter: Don
P. Cram; Counsel for Plaintiff: A. Calder MacKay,
Arthur McGregor, Stafford R. Grady; Counsel for
Defendant: Robert H. Wyshak, Asst. U.S. Atty.

Proceedings: For further trial.

John V. Morris and John P. Tripps, respectively,
are called, sworn, and testify for plaintiff.

Portions of deposition of Charles W. Triggs,
taken on behalf of defendant Aug. 5, 1954, are read
into evidence.

Plf's Ex. 1 to 36 incl. are admitted in evidence.

Plaintiff rests.

Portion of Deposition of Charles W. Triggs,
taken on behalf of plaintiff Aug. 5, 1954, is read
into evidence on behalf of defendant.

Defendant rests.

Attorneys MacKay and Wyshak argue to the
Court.

The Court makes a statement and finds in favor
of plaintiff.

It is ordered that judgment be in favor of plain-
tiff; amount to be computed under Rule 7.

EDMUND L. SMITH,

Clerk

[32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having come on for trial on the 6th and 7th days of January, 1955, before the Court, the Honorable Leon R. Yankwich sitting without a Jury; plaintiff having been represented by its counsel, Mackay, McGregory, Reynolds & Bennion, through A. Calder Mackay, Arthur McGregor and Stafford R. Grady, and the defendant having been represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Robert H. Wyshak, Assistant United States Attorney; and after having considered the pleadings, the stipulations, the oral and documentary evidence adduced, the memoranda and the oral arguments of counsel for the respective parties, the Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff was incorporated under and by virtue of the laws of the State of California, on November 20, 1917, as The French [33] Sardine Company of California. On April 24, 1953, the name of plaintiff corporation was changed to Star-Kist Foods, Inc. At all times since its incorporation, plaintiff has been engaged in the fish cannery business, its principal products being canned sardines, mackerel and

tuna. Plaintiff purchases raw fish by the ton from fishermen, cans the fish and sells it to customers (who then resell it to consumers) through brokers. Plaintiff maintains its offices and principal place of business at 181 Fish Harbor Wharf, Terminal Island, Los Angeles, California, within the jurisdiction of this Court.

II.

Plaintiff keeps its books and files its tax returns on the basis of the accrual method of accounting, and on the basis of fiscal years ending May 31. Plaintiff filed a timely corporation income and declared value excess profits tax return (Form 1120), and a timely excess profits tax return, for the fiscal year ended May 31, 1943, the taxable year involved in this proceeding, with the Collector of Internal Revenue for the Sixth District of California, and paid the taxes shown due thereon. The Schedule of Income, Declared Value Excess Profits and Excess Profits Taxes Paid and Post War Refunds and Adjustments for the taxable year ended May 31, 1943, (Exhibit No. 1 attached to Supplemental Pre-Trial Stipulation of Facts) is incorporated herein by this reference.

III.

By its check number 16577, dated May 20, 1943, plaintiff paid to the Treasurer of the United States, \$97,215.00, representing the exact amount of certain alleged overcharges on the sale by plaintiff of certain of its products (canned tuna), i.e., single

damages, in settlement of claims made against plaintiff by the Office of Price Administration. [34]

IV.

On its tax returns (referred to in paragraph II above for the taxable year ending May 31, 1943) plaintiff deducted the amount of \$97,215.00 as an ordinary and necessary business expense. The Commissioner of Internal Revenue disallowed the amount of \$97,215.00 as a deduction; additional taxes were asserted against and paid by plaintiff.

V.

On October 14, 1949, plaintiff filed with Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth District of California, a timely claim for refund (Form 843) in the form and manner as required by law, claiming a refund of taxes alleged therein to have been overpaid (plus interest thereon as provided by law) in large part as a result of the disallowance of said \$97,215.00 as a deduction. A period of more than six months had elapsed since the filing of said claim for refund, when the instant action was commenced by the filing of the complaint herein on February 27, 1952; plaintiff had not then received any notice from the Commissioner of Internal Revenue that any action had been taken with respect to said claim for refund; and said Westover was no longer in office.

VI.

The payment of \$97,215.00, referred to in paragraph III above, to the Treasurer of the United

States, grew out of the following circumstances: The Emergency Price Control Act of 1942 was approved on January 30, 1942, and pursuant thereto, the Administrator of the Office of Price Administration (frequently hereinafter referred to as OPA) issued the General Maximum Price Regulation (frequently hereinafter referred to as GMPR). This regulation fixed the price at which the plaintiff could sell its products at the same price at which it had sold them during the month of March, 1942.

VII.

Plaintiff had not sold fancy light meat tuna during March, 1942, and it was, therefore, required, under the terms of GMPR, to adopt as its ceiling price for that commodity, the price which was charged during March, 1942, by its nearest competitor. There was some dispute and confusion among plaintiff's officials as to who was plaintiff's nearest competitor. A. T. Williams, plaintiff's sales manager, chose Van Camp Sea Food Company, out of an abundance of caution; because Van Camp had the lowest price in the industry, i.e., \$11.00 per case on fancy light meat tuna, basis 48/1½'s. Plaintiff's legal counsel, John Morris, Esq., was consulted about the choice of Van Camp as plaintiff's nearest competitor, and he advised that other canners were more closely comparable with plaintiff than was Van Camp, and that the ceilings of these other canners, which ceilings were higher than Van Camp's, should be taken as plaintiff's ceilings. Notwithstanding this advice, plaintiff accepted the lowest

ceiling price in the industry as its own. Other canners had ceiling prices on this same product several dollars higher. For instance, High Seas Tuna Company, of San Diego, which was controlled by the same individual (Martin J. Bogdanovich) who controlled plaintiff, had a ceiling price of \$14.00 per case on fancy light meat tuna, basis 48/1½'s.

VIII.

No ceilings were fixed upon the price of raw fish by GMPR. As a result, prices which canners had to pay for their raw material—fresh fish—rose rapidly. This was true in many kinds of fish, including tuna. For instance, by the end of 1941, yellowfin (tuna) was bringing \$130.00 per ton. Early in 1942, the price jumped to \$160.00 and by the end of the season the price had advanced to \$190.00. Including bonuses paid fishermen, the 1942 year ended with an average price of \$200.00 per ton. [36] This situation was recognized and reflected in the Statement of Considerations issued by the Administrator of OPA when the price of fresh tuna fish was finally fixed by Regulation No. 366 issued on April 13, 1943.

IX.

Plaintiff was caught in an economic bind. It was required to sell its canned fancy light meat tuna for \$11.00 per case, the lowest price in the industry; but it was simultaneously required to pay rapidly rising prices in order to procure raw fish.

X.

This situation, i.e., the widely varying ceiling prices which various canners had upon the same product under GMPR, together with the fact that the price of raw fish was not fixed, and constantly rising, was recognized in the summer of 1942 as an inequitable one by the officials of the OPA, including Charles W. Triggs, who was then the head of the Fish Section of the Office of Price Administration in Washington. Triggs proposed to remedy this situation by issuing a regulation fixing, at a definite dollar and cents figure, the price at which all canners would be required to sell the same product, and also by fixing the price which fishermen could charge for the raw fish.

XI.

For the purpose of obtaining some relief from this inequitable situation, plaintiff's sales manager, Williams, was in constant touch with OPA officials in Washington during the Summer and Fall of 1942. He made several trips to Washington to confer with Triggs concerning the matter; he spoke with Triggs frequently over the long distance telephone; and he wrote Triggs. Triggs was of the firm belief that plaintiff was in a bad position and advised Williams that a new regulation, which would give plaintiff relief, could be expected momentarily; and gave Williams reason [37] to believe that the expected new dollar and cents ceiling price for fancy light meat tuna would be \$12.00 per case, basis 48/1½'s.

XII.

New dollar and cents ceiling prices were fixed on several canned fish products during the late Summer and Fall of 1942, by issuance of the following regulations:

Regulation No.	Date	Product
184	July 23, 1942	Maine Sardines
209	Aug. 31, 1942	California Sardines
247	Oct. 24, 1942	Domestic Canned Crab Meat
252	Oct. 30, 1942	Vinegar Cured Herring
265	Nov. 9, 1942	Salmon
277	Nov. 28, 1942	Mackerel

The ceiling prices fixed by these regulations were higher than the lowest ceilings under GMPR. For instance, Regulation No. 209, effective August 31, 1942, fixed the prices at which plaintiff was entitled to sell its sardines at figures which averaged 20.9% higher than the ceiling price which plaintiff had had under GMPR.

XIII.

While awaiting the new anticipated dollar and cents ceiling on canned tuna, plaintiff accumulated a rather large inventory with a value of over a half million dollars. During the last week in August and the first three weeks of September, 1942, plaintiff shipped about 40 carloads of canned tuna without invoicing it. Toward the end of September, plaintiff's cash position became relatively low. Whereas plaintiff's cash expenditures averaged approximately \$235,000.00 per week during the sardine season months of October through December, 1942, plaintiff had on hand cash in the amount of

\$144,919.07 as of September 24, 1942; i.e., less than a week's supply to pay plant payroll, trade accounts, fishermen accounts and other cash requirements. [38]

XIV.

Faced with this situation, Williams consulted Triggs and was advised that the expected dollar and cents ceiling on tuna would be issued shortly; that inasmuch as OPA was allowing increased prices on other canned fish, plaintiff would not be taking any chances by raising its price; that he (Triggs) would support anything plaintiff might do within reason. Plaintiff's legal counsel, John Morris, was consulted concerning what steps plaintiff might take. He advised that tuna might be both canned and sold through the High Seas Tuna Packing Company in San Diego at a \$14.00 per case ceiling, since both plaintiff and High Seas were controlled by the same individual, Martin J. Bogdanovich. However, Mr. Bogdanovich decided against this course, because he did not want to profiteer because of the war. Morris also considered the following matters: The admittedly inequitable situation in which plaintiff found itself with the lowest ceiling in the industry under GMPR; the possibility that plaintiff's ceiling was really not \$11.00 a case on fancy light meat tuna because of his opinion that Van Camp was not plaintiff's nearest competitor; the pronouncements from government officials in Washington, and particularly one by Secretary Wicard that inequities under GMPR would be corrected as rapidly as possible, but that

nothing in it should retard production; and the assurances from Triggs; and, based upon these considerations and others, Morris advised plaintiff that in his opinion it would be proper to invoice plaintiff's customers, at \$12.00 per case of fancy light meat tuna, basis 48/1½'s, and place the following notation upon the invoice:

"Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1½'s [39] and \$2.00 per case less on 48/1's, and will refund you accordingly."

XV.

In accordance with this advice plaintiff, on and after September 24, 1942, invoiced its customers with the notation indicated above. Plaintiff also sent a mimeographed announcement to all of its customers on September 24, 1942, explaining its action. On the same day plaintiff by letter advised Triggs of the action taken.

XVI.

Due to delays in the Washington office of OPA, the expected regulation fixing a dollar and cents price on canned tuna was not issued until January 7, 1943. On that date, by Regulation No. 299, the OPA fixed the ceiling price on fancy light meat tuna at \$12.00 per case, basis 48/1½'s, i.e., at exactly the price at which plaintiff had invoiced its customers.

XVII.

Thereafter, the local (Los Angeles) enforcement office of the OPA conducted an investigation of plaintiff's sales of canned tuna during the period from September 24, 1942, until the new regulation was issued in January, 1943, and determined that plaintiff had overcharged its customers \$97,215.00 on sales of canned tuna. Conferences were had between officials of plaintiff and enforcement officials of the Los Angeles office of the OPA. Plaintiff's representatives were told that they had violated GMPR, although they did not violate the intent or purpose of the Act; that in view of the extenuating circumstances, the OPA would consider the matter closed if plaintiff would present them (the OPA enforcement officials) with a check in favor of the Treasurer of the United States for the exact amount of the overcharge, as a contribution to the war effort. Plaintiff thereupon made the payment, dated May 20, 1943, in the amount of \$97,215.00 to the Treasurer of [40] the United States. Plaintiff's officers also signed a waiver of answer and consent judgment in an action to restrain future violations, which action was thereafter, on June 3, 1943, filed by the OPA, in this Court against plaintiff.

XVIII.

The action of the Los Angeles enforcement officials of OPA in accepting single damages, instead of suing plaintiff for treble damages, was approved in the Washington office of OPA by Herman A. Greenberg, who was then Chief of Enforcement of

the Meat and Dairy Products Section of the Food Enforcement Branch of OPA, after investigation, including a review of the correspondence between plaintiff and Triggs, and a conference with Triggs in Washington. Single damages were accepted because it was considered that plaintiff's violation was inadvertent and not willful; that plaintiff had acted in good faith and had taken reasonable precautions to comply with the law.

XIX.

The payment by plaintiff to the Treasurer of the United States in the amount of \$97,215.00 on May 20, 1943, was made in circumstances which are inconsistent with an intention to violate the Emergency Price Control Act of 1942 and the Regulations issued thereunder, and inconsistent with a lack of due care to conform to the law and regulations; plaintiff acted in good faith and took reasonable precautions to avoid violating the law and regulations; the payment was a method of preventing unjust enrichment by plaintiff as a result of the overcharge, and it did not constitute a penalty; and allowance of said payment as a deduction would not frustrate enforcement of the applicable law or regulations and would not violate public policy. Plaintiff is entitled to deduct the amount of \$97,215.00 as an ordinary and necessary business expense for the fiscal year ended May 31, 1943. [41]

XX.

As a result of the Commissioner of Internal Revenue's erroneous and illegal action in disallowing

the said amount of \$97,215.00 as a deduction, plaintiff has made overpayments of declared value excess profits tax and excess profits tax and interest thereon for the taxable year ended May 31, 1943, and is entitled to a refund of said amounts plus interest thereon as provided by law.

Conclusions of Law

I.

The Court has jurisdiction of this action and of the parties hereto.

II.

The amount of \$97,215.00 paid by plaintiff to the Treasurer of the United States on May 20, 1943, constitutes an ordinary and necessary business expense incurred in its trade or business, within the purview of Section 23 (a) (1) (A) of the Internal Revenue Code of 1939, and plaintiff is entitled to a deduction in that amount in computing its income, declared value excess profits tax and excess profits tax for the fiscal year ended May 31, 1943.

III.

Plaintiff filed a timely and valid claim for refund of taxes and interest overpaid as a result of the Commissioner of Internal Revenue's disallowance of the amount of \$97,215.00 as a deduction, and said claim for refund not having been acted upon within six months thereafter, the instant action, based upon the facts and grounds set forth in said claim for refund, was duly commenced within the period allowed by law. [42]

IV.

The name of plaintiff corporation was duly changed from The French Sardine Company of California to Star-Kist Foods, Inc. on April 24, 1953.

V.

Plaintiff, Star-Kist Foods, Inc., is entitled to a judgment against the United States of America, for a refund of declared value excess profits tax and excess profits tax and interest overpaid by it for the fiscal year ended May 31, 1943, as follows:

Declared Value Excess Profits Tax

Overpayment of tax—July 29, 1948	\$12,710.40
Overassessment not allowed—July 29, 1948	121.98
	<hr/>
	12,832.38
Overpayment of interest	3,639.01
	<hr/>
	\$16,471.39
Refund: \$16,471.39 plus interest on \$16,349.41 from July 29, 1948, and interest on \$121.98 from May 15, 1944.	

Excess Profits Tax:

Overpayment of tax—October 19, 1951	\$34,598.38
Overpayment of Interest—Jan. 31, 1952	17,507.20
	<hr/>
	\$52,105.58
Overpayment of Tax—July 29, 1948	\$32,887.34
Overpayment of Interest—July 29, 1948	9,894.71
	<hr/>
	\$42,782.05

Refund: \$42,782.05 plus interest thereon from July 29, 1948; and \$52,105.58 plus interest on \$34,598.38 from October 19, 1951, and interest on \$17,507.20 from January 31, 1952. [43]

Interest shall be at the rate of six per cent per annum and shall run from the date indicated until a date preceding the issuance of the refund check by not more than thirty days.

Dated this 3rd day of February, 1955.

/s/ LEON R. YANKWICH,

United States District Judge [44]

[Endorsed]: Lodged Jan. 21, 1955.

[Endorsed]: Filed Feb. 3, 1955.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PROPOSED FINDINGS OF FACT

Defendant objects to certain of the plaintiff's proposed findings of fact as follows:

I.

Proposed Finding of Fact No. III is as follows:

"By its check number 16577, dated May 20, 1943, plaintiff paid to the Treasurer of the United States, \$97,215.00, representing the exact amount of certain alleged overcharges on the sale by plaintiff of

certain of its products (canned tuna), i.e., single damages, in settlement of claims made against plaintiff by the Office of Price Administration."

This proposed finding speaks of "certain alleged overcharges." It is submitted that there is no question but that there was an overcharge and that subsequent findings so indicate [46] and are consistent with this objection.

II.

Proposed Finding of Fact No. IX is as follows:

"Plaintiff was caught in an economic bind. It was required to sell its canned fancy light meat tuna for \$11.00 per case, the lowest price in the industry; but it was simultaneously required to pay rapidly rising prices in order to procure raw fish."

The plaintiff was not required to either buy or sell tuna under GMPR or any other regulation. There was no testimony that there was any compulsion on the plaintiff to do so. This finding should, therefore, be omitted.

III.

The first sentence of proposed Finding of Fact No. XIV is as follows:

"Faced with this situation, Williams consulted Triggs and was advised that the expected dollar and cents ceiling on tuna would be issued shortly; that inasmuch as OPA was allowing increased prices on other canned fish, plaintiff would not be taking any chances by raising its price; that he (Triggs)

would support anything plaintiff might do within reason.”

It is submitted that Triggs’ testimony as set forth in the deposition taken on behalf of the defendant does not support this statement. At page 7 of said deposition, in answer to the question: “Did you make a commitment to them?” Answer: “Well, I might have made the statement that I would support anything that they might do if it was within reason. That would be logical for me to do. Inasmuch as we were allowing increased [47] prices on other canned fish, I might possibly have made the statement they wouldn’t be taking any chances or something of that kind.” As can be seen, Mr. Triggs was merely stating what he might have said and not what his memory told him he had said. Thus, there is nothing in his testimony to support this finding.

IV.

The first three sentences of proposed Finding of Fact No. XVII are as follows:

“Thereafter, the local (Los Angeles) enforcement office of the OPA conducted an investigation of plaintiff’s sales of canned tuna during the period from September 24, 1942, until the new regulation was issued in January, 1943, and determined that plaintiff had overcharged its customers \$97,215.00 on sales of canned tuna. Conferences were had between officials of plaintiff and enforcement officials of the Los Angeles Office of the OPA. Plaintiff’s representatives were told that they had violated

GMPR, although they did not violate the intent or purpose of the Act; that in view of the extenuating circumstances, the OPA would consider the matter closed if plaintiff would present them (the OPA enforcement officials) with a check in favor of the Treasurer of the United States for the exact amount of the overcharge, as a contribution to the war effort."

Those representatives of the Los Angeles Enforcement Office of the OPA who conferred with the plaintiff did not testify on behalf of either party. There is no evidence whatsoever to substantiate the finding that the OPA representatives had told the plaintiff's representatives "that they had violated GMPR, although they did not violate the intent or purpose of the Act;" [48] This sentence should, therefore, be stricken.

V.

Proposed Finding of Fact No. XVIII is as follows:

"The action of the Los Angeles enforcement officials of OPA in accepting single damages, instead of suing plaintiff for treble damages, was approved in the Washington office of OPA by Herman A. Greenberg, who was then Chief of Enforcement of the Meat and Dairy Products Section of the Food Enforcement Branch of OPA, after investigation, including a review of the correspondence between plaintiff and Triggs, and a conference with Triggs

in Washington. Single damages were accepted because it was considered that plaintiff's violation was inadvertent and not willful; that plaintiff had acted in good faith and had taken reasonable precautions to comply with the law."

The evidence does not substantiate the finding that "plaintiff's violation was inadvertent and not willful;" since the evidence is clear that the plaintiff's officials had accepted a \$11.00 ceiling and knew that they were selling for an amount in excess of this ceiling. The violation resulted from intentional rather than inadvertent acts.

VI.

The basis for the objection set forth in paragraph V is also applicable to the first sentence of proposed Finding of Fact No. XIX, which provides as follows:

"The payment by plaintiff to the Treasurer of the United States in the amount of \$97,215.00 on May 20, 1943, was made in circumstances which are inconsistent with an intention to violate the Emergency Price Control Act of 1942 [49] and the Regulations issued thereunder, and inconsistent with a lack of due care to conform to the law and regulations;"

The plaintiff's officers did what they did intentionally and their actions constituted a violation of the Act.

Dated: February 2, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant [50]

Affidavit of Service by Mail attached. [51]

[Endorsed]: Filed Feb. 2, 1955.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 13867-Y

STAR-KIST FOODS, INC., (formerly THE
FRENCH SARDINE COMPANY OF CALI-
FORNIA) Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause came on for hearing on January 6 and 7, 1955, before the Honorable Leon R. Yankwich, District Judge, presiding, without the intervention of a Jury. Plaintiff was represented by its counsel, Mackay, McGregor, Reynolds & Bennion, through A. Calder Mackay, Arthur McGregor and Stafford

R. Grady, and defendant was represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Robert H. Wyshak, Assistant United States Attorney. The Court having made and filed its Findings of Fact and Conclusions of Law,

It is hereby ordered, adjudged and decreed that the plaintiff, Star-Kist Foods, Inc., have and recover against the defendant, the United States of America, the following amounts:

(1) \$59,253.44 plus interest on \$59,131.46 from July 29, 1948 and interest on \$121.98 from May 15, 1944. [52]

(2) \$52,105.58 plus interest on \$34,598.38 from October 19, 1951 and interest on \$17,507.20 from January 31, 1952.

Interest shall be at the rate of six per cent per annum and shall run from the date indicated until a date preceding the issuance of the refund check by not more than thirty days.

Each party shall bear its own costs.

Dated this 3rd day of February, 1955.

/s/ LEON R. YANKWICH,
United States District Judge [53]

Acknowledgment of Service attached. [54]

[Endorsed]: Lodged Jan. 21, 1955.

[Endorsed]: Judgment entered and filed Feb. 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff above named and to its Attorneys,
Mackay, McGregor, Reynolds & Bennion, 523
West Sixth Street, Los Angeles 14, California:

You and each of you, are hereby advised that the defendant, United States of America, does hereby appeal to the Court of Appeals for the Ninth Circuit from the order for judgment in favor of plaintiff dated and entered January 7, 1955, in the above entitled case.

Dated: This 8th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant,
United States of America [55]

Affidavit of Service by Mail attached. [56]

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff above named and to its Attorneys,
Mackay, McGregor, Reynolds & Bennion, 523
West Sixth Street, Los Angeles 14, California:

You and each of you, are hereby advised that the
defendant, United States of America, does hereby
appeal to the United States Court of Appeals for
the Ninth Circuit from the judgment in favor of
plaintiff docketed and entered February 3, 1955, in
the above entitled case.

Dated: March 30, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant [57]

Affidavit of Service by Mail attached. [58]

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO
DOCKET CAUSE ON APPEAL AND
ORDER

Comes now the defendant-appellant, and moves the Court to extend the time to docket the cause on appeal 50 days under Federal Rule Civil Procedure 73 (g) upon the grounds that the Attorney General of the United States on April 14, 1955, requested a 50-day extension of time within which to docket the appeal in order to enable the Solicitor General of the United States to determine whether an appeal should be taken.

Dated: This 15th day of April, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK, [59]
Attorneys for Defendant-Appellant

Order

Good cause appearing therefor:

It is hereby ordered that the time within which to file the record and docket the above entitled appeal, from the order for judgment in favor of plain-

tiff entered January 7, 1955, in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including June 6, 1955.

Dated: This 15th day of April, 1955.

/s/ LEON R. YANKWICH,

United States District Judge

Presented by:

/s/ ROBERT H. WYSHAK,

Assistant United States Attorney [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO
DOCKET CAUSE ON APPEAL AND
ORDER

Comes now the defendant-appellant, and moves the Court to extend the time to docket the above entitled appeal from the judgment in favor of plaintiff docketed and entered February 3, 1955, 50 days under Federal Rule of Civil Procedure 73 (g) for the reason that the Solicitor General of the United States has not yet determined whether an appeal should be taken.

Dated: This 3rd day of May, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK, [62]
Attorneys for Defendant-Appellant

Order

Good cause appearing therefor:

It is hereby ordered that the time within which to file the record and docket the above entitled appeal from the judgment in favor of plaintiff docketed and entered February 3, 1955, in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including June 28, 1955.

Dated: May 3rd, 1955.

/s/ LEON R. YANKWICH,
United States District Judge

Presented by:

/s/ ROBERT H. WYSHAK,
Assistant United States Attorney [63]

Affidavit of Service by Mail attached. [64]

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

Pursuant to the provisions of Federal Rule of Civil Procedure 75 (d), appellant hereby designates the following points upon which it intends to rely on its appeal, to-wit:

(1) The Trial Court erred in adopting the Findings of Fact and Conclusions of Law, filed February 3, 1955;

(2) The Trial Court erred in adopting the Judgment docketed and entered February 3, 1955;

(3) The Trial Court erred in ordering Judgment for the plaintiff in its Minutes, dated January 7, 1955;

(4) The Trial Court erred in overruling the Defendant's Objections to the Proposed Findings of Fact, filed February 2, 1955;

(5) The Trial Court erred in failing to find that [65] the plaintiff had made an overcharge in the sum of \$97,215.00 on the sale of certain of its products;

(6) The Trial Court erred in failing to find that the plaintiff's violation of the Emergency Price Control Act of 1942 and regulations thereunder was the result of intentional and willful acts by the plaintiff;

(7) The Trial Court erred in failing to find that the payment by plaintiff to the Treasurer of the United States in the amount of \$97,215.00 on May 20, 1943, was the result of intentional acts by the plaintiff and its officers with full knowledge of and without regard to the applicable law and regulations under the Emergency Price Control Act of 1942;

(8) The Trial Court erred in failing to find that the plaintiff comprehended the applicable law and regulations as to the ceiling prices on its products and knew at the time of the sales in question that the invoice price was in excess of the ceiling price;

(9) The Trial Court erred in finding that the plaintiff was required to sell its products at its ceiling prices;

(10) The Trial Court erred in finding that the plaintiff's representatives were told by the OPA Enforcement Officials in Los Angeles that they had not violated the intent or purpose of the Act;

(11) The Trial Court erred in finding that the plaintiff took reasonable precautions to avoid violating the OPA law and regulations;

(12) The Trial Court erred in finding that the allowance of the \$97,215.00 payment as a deduction from gross income did not frustrate enforcement of the applicable law and regulations and did not violate public policy; [66]

(13) The Trial Court erred in finding that the payment to the Treasurer of the United States in the amount of the overcharge, \$97,215.00, was an ordinary and necessary business expense.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,

Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK, [67]

Attorneys for Defendant-Appellant

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

2/27/52—Fld. Compl. for Recovery of Taxes. Issd.
Sums. Made Report J. S. 5.

2/29/52—Fld. Sums.—Retn. Svd.

4/30/52—Fld. stip. & ord. thereon that deft. have
to & incl. 6/27/52 to answer.

7/3/52—Fld. stip. & ord. thereon that deft. have to
& incl. 8/26/52 to answer.

8/27/52—Fld. stip. & ord. thereon that deft. have
to & incl. 8/26/52 to answer.

10/24/52—Fld. Answer.

12/ 2/52—Fld. & ent. pre-trial ord. set for 2/9/53,
1:30 p.m.

12/11/52—Fld. mot. & fld. ord. thereon cont. pre-
trial hrg. to 5/11/53 at 1:30 p.m.

4/ 6/53—Fld. mot. of pltf. & ord. that pre-trial
hrq. to be contd. to 7/13/53 10 a.m.

6/ 8/53—Fld. Pltfs. pretrial memo of law.

6/16/53—Fld. stip. & ord. thereon that pre-trial date now set for 7/13/53 be contd. to 9/14/53 at 10 a.m.

8/10/53—Fld. stip. & ord. contg. pre-trial to 10 a.m., 12/14/53.

11/12/53—Fld. stip. & ord. thereon that pre-trial now set for 12/14/53 be contd. to 4/19/54.

4/19/54—Fld. stip. & ord. thereon that pre-trial now set for 4/19/54 be cont. to 5/17/54, 10 a.m.

5/17/54—Fld. stip. & ord. thereon that pre-trial hearg. now set for 5/17/54 be cont. to 6/21/54, 10 a.m.

6/17/54—Fld. stip. & ord. contg. pre-trial proc. to 10 a.m., 7/26/54.

7/ 2/54—Fld. Deft's Not. of tkg. of deposn. on written interrogs. of Chas. W. Triggs, 7/20/54.

7/12/54—Fld. Pltf's Mot. to enlarge time to obj. to interrogs. set for 3 p.m., 7/12/54.

7/12/54—Fld. pltf's mot. for ord. that depos. be tkn. on oral exam. or for lv. to cross-examine orally & for other relief, with memo. of pts. & auths. Fld. affid. of A. Calder Mackay. Fld. affid. of Roland G. Swaffield. [74]

7/12/54—Fld. not. of mot. for 3 p.m. 7/12/54. Ent. proc. on hrg. mot. Ent. ord. granting motion.

- 7/13/54—Lodged proposed stip. & ord. vacating deposns. on written interrogs. & for oral deposn. Chas. W. Triggs.
- 7/19/54—Fld. Stip. & Ord. thereon vacating deposn. on written interrogs. & for oral deposn. of Chas. W. Triggs.
- 7/22/54—Fld. Stip. & Ord. thereon that deposn. of Chas. W. Trigg now set for 7/19/54 be tkn. wk. commeneg. 8/2/54. Fld. Stip. & Ord. thereon that pre-trial hearng. now set for 7/26/54 be contd. to 9/27/54 at 10 a.m.
- 9/27/54—Pre-trial hrg. contd. to 10 a.m. 10/4/54.
- 9/28/54—Fld. Stip. & Ord. thereon that pre-trial hearng. now set for 9/27/54 be contd. to 10/4/54 at 10 a.m.
- 9/30/54—Fld. pre-trial memo. of Law by USA.
- 10/ 4/54—Ent. ord. contg. to 10 a.m. 11/8/54 pre-trial hrg.
- 10/15/54—Fld. depos. Charles W. Triggs tkn. 8/5/54.
- 11/ 8/54—Ent. ord. contg. fur. pre-trial to 10 a.m. 11/22/54 ent. ord. settg. for trial 9:30 a.m. 12/10/54.
- 11/23/54—Ent. proc. on fur, pre-trial hrg.; fld. pre-trial stip. of facts; fld. plf's pre-trial stnt. of issues. Ent. ord, contg. trial from 12/10/54 to 10 a.m. 12/20/54.
- 12/16/54—Ent. ord. contg. trial to 2 p.m. 1/3/55.
- 1/ 3/55—Ent. ord. vacating trial date of today & contd. to 10 a.m. 1/10/55 for resetting.
- 1/ 5/55—Fld. supp. pre-trial memo. of law of plf.

- 1/ 6/55—Ent. ord. off cal. for trial & placed on cal. 10 a.m., 1/10/55 for setting. Ent. procs. trial bef. J. Yankwich. Fld. dfts. trial memo. Fld. suppl. pre-trial stip. of facts. Ent. ord. all procs. be held under true name plf. which is now “Star-Kist Foods, Inc.” Fld. ex. Ent. ord. contg. 1/7/55. fur. trial.
- 1/ 7/55—Ent. procs. (Y) fur. trial. Ent. ord. jgmt. be favor plf. amt. to be computed under local rule 7.
- 1/11/55—Fld. Ord. trfg. case to Ct. of Hon. Leon R. Yankwich for all fur. predgs. per Rule 2. Attys. Ntfd.
- 1/21/55—Lodged proposed findings fact & concls. law; & lodged proposed jgmt.
- 1/26/55—Ent. ord. dft. hv. fur. extension time until 5 p.m., 2/2/55 to present objs. to prop. findgs. & jgmt. [75]
- 2/ 2/55—Fld. Deft’s objs. to proposed findings.
- 2/ 3/55—Fld. finds. fact & concls. law & fld. dktd. & ent. judg. fv. plf. & against deft. in amts. of \$59,253.44 and \$52,105.58 with int. etc., Not. attys. JS6.
- 3/ 8/55—Fld. USA’s not. of appeal with affid. of svce. by mail as to Mackay, McGregor, Reynolds & Bennion, 728 Pac. Mut. Bldg., 523 W. 6th St., LA 14, Calif.
- 3/30/55—Fld. deft’s Not. of Appeal. Mld. copies to Mackay, McGregor, Reynolds & Bennion, 728 Pac. Mut. Bldg., LA 14.

4/15/55—Fld. Mot. of USA for extension of time to docket cause on appeal to & incldg. 6/6/55 & ord. thereon together with affid. of svce. by mail.

5/ 3/55—Fld. defts. mot. with ord. thereon that sd. deft. hv. time in which to dkt. appeal extended 50 days.

6/ 3/55—Fld. USA's designation of contents of record on appeal. Fld. appelts. stmt. of pts. to be relied upon on appeal.

6/ 9/55—Fl. plf-appellees desig. of addl. contents of rec. on appeal.

6/20/55—Fld. reporter's Transc. of procs. for 1/6, 1/7/55. [76]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 71, inclusive, contain the original

Complaint;

Summons;

Defendant's Answer;

Pre-Trial Stipulation of Facts;

Supplemental Pre-Trial Stipulation of Facts;

Findings of Fact and Conclusions of Law;

Defendant's Objections to Proposed Findings of Fact;

Judgment;

Notice of Appeal filed March 8, 1955;

Notice of Appeal filed March 30, 1955;

Motion for Extension of Time to Docket Cause on Appeal and Order; filed April 15, 1955;

Motion for Extension of Time to Docket Cause on Appeal and Order filed May 3, 1955;

Appellant's Statement of Points to be Relied upon on Appeal;

Designation of Contents of Record on Appeal;

Plaintiff's-Appellant's Designation of Additional Contents of Record on Appeal, which, together with a full, true copy of the Minutes of the Court had on January 7, 1955; one photostatic copy of Docket Entries; one volume of reporter's transcript of proceedings had on January 6 and 7, 1955; and plaintiff's exhibits 1 to 36, inclusive; all in said cause; constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60, which sum has not been paid by appellant.

Witness my hand and the seal of said District Court, this 22nd day of June, 1955.

[Seal]

JOHN A. CHILDRESS,

Clerk

/s/ By CHARLES E. JONES,

Deputy

In the United States District Court for the Southern District of California, Central Division

Civil No. 13867-Y

STAR-KIST FOODS, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

TRANSCRIPT OF PROCEEDINGS (Partial)

Los Angeles, California, January 6, 1955

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiff: Messrs. Mackay, McGregor, Reynolds & Bennion, by A. Calder MacKay; Arthur McGregor and Stafford Grady, 523 W. 6th St., Los Angeles, Calif. For the Defendant: Laughlin E. Waters, U. S. Attorney, by Edward R. McHale, Chief, Tax Division; Robert H. Wyshak, Asst. U. S. Attorney. [1*]

Thursday, January 6, 1955, 3:20 p.m.

* * * * *

HERMAN A. GREENBERG

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Herman A. Greenberg, G-r-e-e-n-b-e-r-g.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Herman A. Greenberg.)

Direct Examination

By Mr. Grady:

Q. What is your occupation?

A. I am a lawyer.

Q. Are you practicing law now?

A. I am, sir.

Q. Where? A. Washington, D.C.

Q. Would you give us a brief summary of your educational background? Where did you graduate from law school?

The Court: I don't think that is material. Were you with the OPA before?

The Witness: Yes, sir.

The Court: He is not testifying as an expert, so let's eliminate that and let's get down to his official capacity so as to see what part he had in this and how far he is competent to testify as to official policy. Not that I [3] wouldn't like to hear it. I always like to hear the educational background of Government men. I think there are some very fine men who perform Government service despite the present attitude about men in the Government service. So let us eliminate that.

Mr. Grady: Yes, your Honor.

Q. By Mr. Grady: Mr. Greenberg, you were associated with the Office of Price Administration during 1942 and 1943, were you not?

A. Yes, sir.

Q. In what capacity?

A. During 1942 and part of '43 I was chief of the Meat and Dairy Branch of the Enforcement

(Testimony of Herman A. Greenberg.)

Division, and shortly thereafter became the director of the Food Enforcement Division of the OPA.

Q. What were your responsibilities in those two positions?

A. As far as number of commodities are concerned, or——

Q. Just generally.

A. Well, the responsibility was the overall supervision of the enforcement of the regulations referring to food.

Q. Was tuna, canned tuna fish one of the products which came under your jurisdiction?

A. Yes, sir. [4]

Mr. Grady: I would like to have this document marked for identification, please.

The Clerk: Plaintiff's Exhibit 1 marked for identification only.

(The document referred to was marked Plaintiff's Exhibit 1 for identification.)

Mr. Wyshak: May I see it, counsel?

(Whereupon the document was handed to counsel for the defendant.)

Q. By Mr. Grady: I show you what has been marked Plaintiff's Exhibit 1 for identification and ask you if you can identify it?

A. Yes, I can.

Q. What is it, please?

A. This is a memorandum dated June 5, 1943, written by me, initialed by me, and addressed to

(Testimony of Herman A. Greenberg.)

the San Francisco Regional Office of the OPA concerning the French Sardine Company, Inc., of Terminal Island.

Mr. Grady: Would it be agreeable to your Honor to have Mr. Greenberg read it aloud. It is relatively short.

The Court: I can read it faster than he can. You ask him a question on it. I can read it and you place a question on it.

Q. By Mr. Grady: You prepared that memorandum, did you, Mr. Greenberg? [5]

A. Yes, sir.

Q. Are you now familiar with the French Sardine case after all these years? Your recollection has been refreshed?

A. My recollection has been refreshed by this memorandum and various other documents, letters, particularly which were sent by the company to Mr. Charles Triggs, which I have seen.

Q. And were those letters and memoranda and telegrams available to you at the time you wrote this memorandum?

A. Yes. From the memorandum itself it appears that I had just had a conversation with Mr. Charles Triggs concerning this matter, at which time I saw the file. And more lately I have again seen the papers that were in that file, and that refreshed my recollection.

Q. Now, in one place in this memorandum you state that there are substantial reasons, I believe, for accepting single damages?

(Testimony of Herman A. Greenberg.)

A. Yes. I wrote, "On the basis of Mr. Triggs' statement to us it appears that there is a substantial reason for accepting single damages."

The Court: Mr. Triggs was the regional director?

The Witness: No, sir. If I may explain, Mr. Triggs was the price executive of the Fish Price Branch in Washington, and he had——

The Court: A Government official?

The Witness: Oh, yes. He is an employee of the OPA, [6] but he issued the regulations and we enforced them. He was the price executive and we were the enforcement crew.

The Court: In other words, I notice throughout this memorandum which I read you took the view that you have to rely upon the advice of these other men rather than be put in the position of exercising judgment for matters which are more within their cognizance.

The Witness: Well, we generally took a position—we had a large number of offices, as you well know. They had the operating responsibility. We had the policy and supervisory responsibility, and we, of course, relied on them for facts and we made no attempts at investigation at all.

The Court: But in this case you relied on Mr. Triggs' decision?

The Witness: To some extent. I was not bound by his decision.

The Court: And also the regional director.

The Witness: Oh, of course.

(Testimony of Herman A. Greenberg.)

The Court: The regional director is the head man.

The Witness: Yes.

The Court: All right.

Mr. Wyshak: Your Honor, I am going to move to strike this testimony on the basis of what is in the administrative file, and we don't have the file——

The Court: Overruled. [7]

Q. By Mr. Grady: Mr. Greenberg, you mentioned in that memorandum there were substantial reasons for accepting the single damages. Would you state what those reasons were, sir?

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Witness: I would say, based on the documents and my recollection—and if your Honor would allow me for a moment, I think it is of some importance—this was 1943. The war was going badly for us at that time. We were under the most insistent pressure at the time, both from Congress and other sources, to——

Mr. Wyshak: Your Honor, would you advise the witness to stick to answering the question?

The Court: He is doing all right. He says he wants to give a little background, which is all right. Go ahead.

The Witness: ——to enforce these regulations vigorously. That we attempted to do. And your Honor was quite correct in your statement some-time ago that the administrator at all times was

(Testimony of Herman A. Greenberg.)

allowed under the law to accept less than treble damages.

We had a firm administrative enforcement policy within the agency that we would not accept less than treble——

Mr. Wyshak: Your Honor, I object to that as immaterial and irrelevant, as to what the OPA policy was with respect to these cases. It is up to your Honor to examine the facts [8] and determine whether this is an intentional violation or not.

The Court: Well, the official memorandum is merely a memorial of what was done, and the man who wrote the memorandum can testify to the reasons, where they are not all set forth.

Mr. Wyshak: Well, in any event, we are not concerned with what the general policy was.

The Court: We are concerned with the policy of what was done in this case, whether they were given the benefit of privilege or whether they merely treated them as other people who had exceeded the price ceiling.

As I told you before, once I begin a case, don't expect me to decide it on anything except a full hearing of the facts. You are acquainted with that, now.

Mr. Wyshak: I am. I still feel we are bound by the rules of evidence.

The Court: That is right; and I believe in the rules of evidence. You told me you were a Massachusetts lawyer. You had better get acquainted with the facts on the civil side of this court. You see,

(Testimony of Herman A. Greenberg.)

we are not bound by any rules of evidence except those which we think are reasonable, and therefore, if law is allowed under the statutes, if the law is allowed under general rules, we are to favor the rules of admissibility.

I will give you a few articles I have written on the subject if you want to become more acquainted with them. [9]

Mr. Wyshak: I would appreciate it, your Honor.

The Court: All right. I have been at this for many years, and I know what the rules of evidence are. And the rules on the civil side are those which favor admissibility. And since the rules were promulgated, the civil rules, in 1938 not one case has been reversed by the Court of Appeals for the Ninth Circuit on inadmissible evidence. In fact, the present rule of the Ninth Circuit was expressed by Judge Garrett, in a case which I will call to your attention very shortly, in which he said at the present time we have the same rule as in equity, everything is admissible with the understanding that the judge will disregard what is immaterial. That is the law of the Ninth Circuit.

Let us continue. We are getting acquainted, you see. He is new in the court. So we are getting acquainted. Let us go on.

The Witness: At that time in 1943, as I said, we were under instructions to proceed very vigorously in the enforcement of these regulations, and we did to the utmost of our ability. Now then, we were allowed under the law, it was the proper interpre-

(Testimony of Herman A. Greenberg.)

tation, that the administrator having instituted a treble damage action which he was entitled under the statute could accept in settlement a lesser sum. Theoretically, I suppose, he could take less than single damages in the settlement. However, as a strict administrative [10] policy, which we adhered to at that time, our instructions from the Washington office to our regional office and district offices was that under no circumstances, with one exception, would less than treble damages be accepted in a claim by the administrator. That exception was where we were satisfied that the violation was innocent and inadvertent and non-willful. Only in that case were they to accept less than treble damages, with this additional exception, if I may say: That even where we insisted on treble damages we of course allowed a payment of a lesser sum on a showing of financial inability to pay. But as I take it, that is not involved here.

Now then, with that policy in mind it was necessary for me at the time that I wrote this memorandum to make a decision. The Los Angeles District Office of the OPA, which was negotiating this with the French Sardine Company, realized that it could not accept a single damage settlement under our policy unless a showing of inadvertence and nonwillfulness was made; and it was for that reason that the Los Angeles District Office, which had normally the authority to settle its own cases, wrote to Washington to get permission on a showing of the facts to settle this for less than treble damages

(Testimony of Herman A. Greenberg.)

—that is, single damages—pointing out that in their opinion this was a nonwillful, inadvertent type of violation. [11]

Mr. Wyshak: Your Honor, I object to that as hearsay.

The Court: Overruled.

The Witness: This memorandum is a statement of our belief, after canvassing the facts, that this was a nonwillful, inadvertent type of violation.

The Court: All right.

Mr. Wyshak: Your Honor, I move to have that stricken as a conclusion of the witness.

The Court: It will be denied. What is the status of that? Has that been received?

Mr. Grady: I have not introduced it. I will do so now. I now offer what has been marked Plaintiff's Exhibit 1 for identification in evidence.

Mr. Wyshak: I object to that, your Honor, as incompetent, irrelevant and immaterial.

The Court: The objection is overruled for the reasons already stated in the course of argument. Counsel, I am not trying to go back of an OPA determination. I am merely trying to show that under the very ruling of the case that counsel for Government has said this was not a fine imposed for willful violation but recovery of an amount of overcharge under circumstances which did not show willfulness but showed justification for accepting it. So that it may be argued that this recovery was necessary business because they had taken the money under the representation to the [12] parties

(Testimony of Herman A. Greenberg.)

that possibly the OPA wouldn't allow it; and then have to give it to the Government—whether it went back to the dealers themselves doesn't matter—have to give it to the Government when the Government, after it is too late for them to adjust the matter with the individual dealer, sought to recover the entire amount of the overcharge.

Mr. Wyshak: Your Honor, my feeling was that the intent of the plaintiff should be evidenced by the act of the plaintiff and not what the OPA thought or did.

The Court: Oh, no, no; because otherwise they go on—as a matter of fact, they are giving you the benefit by showing that the OPA accepted what they did. You can always ask a plaintiff, when intent is material, “What did you intend to do?” That is always permissible in a civil case or a criminal case where intent is material. But they are going further. They are showing that that intent was communicated to the OPA and the OPA accepted that as an indication of good faith, and they are giving you the benefit of more than you are entitled to; not of them saying, “This is proving it,” but, I mean, this is the direction in which the proof is going.

(The document referred to, marked Plaintiff's Exhibit 1, was received in evidence.)

[See page 197.]

Q. By Mr. Grady: Mr. Greenberg, you state in this memorandum that you had a conversation with Mr. Triggs. [13]

(Testimony of Herman A. Greenberg.)

A. That is correct.

Q. Would you state the substance of that conversation, sir?

Mr. Wyshak: Your Honor, I object to that as calling——

The Court: Overruled.

The Witness: My best recollection is that on receipt of this memorandum from the Los Angeles District Office of the OPA I went to see Mr. Triggs and asked him what conversations and negotiations he had had with the French Sardine Company. He advised me generally of those conversations and showed me a file which he had which consisted of written communications from the French Sardine Company from which all these facts appeared—that is, the fact that the company had been caught with a very low ceiling price under the general maximum regulations, that they had continued to can tuna but put it in inventory because they had stated they couldn't afford to sell at their ceiling price because of the increased price of raw tuna; that this was going on for a long period of time; was becoming burdensome to the company; that they inquired of Mr. Triggs what relief they could have; that Mr. Triggs assured them a dollar and cent regulation would issue and that probably the price would be in the neighborhood of \$12 a case; that nevertheless the company refrained from shipping tuna until finally with the regulation, the dollar and cent regulation not issuing, in [14] desperation

(Testimony of Herman A. Greenberg.)

they come back to Triggs and between them they advised the Government wholly——

Mr. Wyshak: I move to have that stricken, your Honor——

The Court: Overruled.

The Witness: ——that the French Sardine Company kept Mr. Triggs advised and suggested to him that they ship this tuna at \$12 a case with an agreement with their customers if and when the dollar and cents regulation issued, if it came out anything less than \$12 they would refund the difference to them.

I discussed with Mr. Triggs whether he had those conversations and he agreed that, generally, he had had those conversations; he was very much in sympathy with the position of the company. I took the position myself—it was my duty to make a decision, and I took the position myself that the company had acted aboveboard, no willfulness, as we understood it, willfulness which we ran into in great number in those years, and which consisted of fraud of one kind or another, double entry, double sets of books, cash on the side and that sort of thing, but this company to the contrary had operated absolutely in the open; and that they had discussed their matter with a person who has ostensible authority for the Government—that is, Mr. Triggs. Mr. Triggs is a fine gentleman. And that they then proceeded on the basis of [15] their discussions with Mr. Triggs, and I felt that this fit our policy of innocence and inadvertence, that the company

(Testimony of Herman A. Greenberg.)

did what it could and reasonably proceeded the way it did as a general exception to our rule of acceptance of single damages.

Q. By Mr. Grady: Would you state just briefly the relationship between the enforcement branch and the price branch? I understand you were from the enforcement branch and Mr. Triggs was from the price branch.

A. That is quite true. The price branch which was the largest division of the OPA, had the responsibility of issuing price regulations. We in the enforcement branch were all lawyers. These gentlemen in the price branch came from industry, as Mr. Triggs, and had experience in this matter, in this particular industry. We were lawyers, and our duty was to enforce regulations. We operated independently of the price branch. That is, they had no authority over us to tell us when to bring a case and when not to bring a case. But of course we worked very closely with them to know what was going on in these industries and to generally be taught by them, and the relationship was a very close one.

Q. Now, you state in this memorandum, and I quote: "He assured us—" meaning Mr. Triggs—"assured us that at no time did he either recommend [16] violation of the regulation or suggest that he might quash any proceedings for violation of the regulations." Does that recall to your mind any particular impressions you had after discussing this matter with Mr. Triggs?

(Testimony of Herman A. Greenberg.)

A. Yes. The Los Angeles district office in writing to me stated that an official of the French Sardine Company had informed them that they discussed this matter with Mr. Triggs; that Mr. Triggs told them to go ahead and sell at the \$12 price; and that if any difficulty arose because of it he, Triggs, would see to it that the sardine company was protected; that is, that no lawsuit would be instituted against them.

Now, Mr. Triggs, as I stated, was an honorable man. He is a fine gentleman. His background is the fish industry. He is back in the fish industry now although he is past the age of eighty. And I knew him well and respected him. But his orientations, I might say, were a little different from ours as lawyers—we were not industry men—and I could easily understand Mr. Triggs telling a company to go ahead and do this even though he might not have the authority to carry it through himself. And this added to my feeling that the company was quite right. They were dealing with an official of the OPA and they had a right to rely upon what he told them.

Q. One final question: Are you being paid any fee [17] for testifying in this case?

A. No. I would not accept a fee.

Q. Do you recall showing Mr. Triggs the check in Washington during your conversation at that time?

A. Yes. That check, which I saw again recently, had been sent on—that is, the check of the sardine

(Testimony of Herman A. Greenberg.)

company for \$90,000 had been sent on by the Los Angeles district office with its memorandum, and on the advice to them that we approved the settlement, we deposited that check with the Treasury in Washington.

Mr. Grady: No further questions, your Honor.

The Court: All right.

Cross Examination

By Mr. Wyshak:

Q. Would you straighten me out, Mr. Greenberg? It isn't clear in my mind. Did Mr. Triggs tell you he had or hadn't told the representative of the French Sardine Company it was all right to raise their prices——

A. Mr. Triggs told me generally of the conversation and communications he had with the sardine company; very sympathetic with their position. And he told me that he had advised them that a dollar and cent regulation would issue at about \$12, which incidentally it did. By the time I had this memorandum I believe the regulation had issued at \$12. On the precise point of whether he told the sardine company [18] that if a case came across his desk he would quash it, in answer to my direct question he denied to me—he said he never said quite that. But I came away with the general impression—and that is the result of that, the memorandum that is now in evidence and that I wrote—that he told the company enough so that they had a right to rely on his word as an official——

(Testimony of Herman A. Greenberg.)

Q. Can you remember his exact words?

A. That, sir, would be extremely difficult for me. I would not attempt——

Q. Can you tell us generally what he said rather than what your impression was?

A. There is a very fine point of difference of what he said rather than my impression of what he said. I am afraid that all I have now is my recollection of what it was.

Q. What is that?

A. I have stated it. I would be glad to state it again.

The Court: That won't be necessary. Give us the substance of the conversation.

Q. By Mr. Wyshak: You haven't answered my original question. Did Mr. Triggs tell you he would tell them it would be all right for them to raise their prices?

A. Mr. Triggs stated to me that he was most sympathetic with the position of the company; that they were caught [19] with a low ceiling price; that he knew all the time that the ceiling price would come out at about \$12 and that for them to hold tuna fish, which the country needed at that time, and not to be able to ship it struck Triggs as difficult, and all he denied to me was, in answer to my precise question, "Charlie, did you tell them that you would quash a case," to this he said no. And of course I don't know exactly what Charlie did tell them as to that.

Mr. Wyshak: Mr. Reporter, would you read my

(Testimony of Herman A. Greenberg.)

question? See if you can answer it yes or no, Mr. Greenberg.

Mr. Grady: I submit that the witness has answered it.

The Court: I think he has given an explanation. I think he could answer yes or no, and then let the explanation stand with it.

Did he tell you specifically that he advised momentarily the raising of the price within the hope that it would later on be made official? That is the point. It is evidence that they billed their dealer with a notation that it was likely that the price might be disapproved. If you don't remember, why, just say so.

The Witness: I cannot recall to answer that question yes or no, or any differently, your Honor, than I did answer it.

The Court: All right.

Q. By Mr. Wyshak: How would you explain this, "He [20] assured us that at no time did he either recommend violation of the regulation—" and so forth?

A. That is what I was referring to before when I said that Mr. Triggs denied to me that he told them that if the case arose he would quash it.

Q. Well, I mean, doesn't this mean that he did not tell them to raise their prices since that clearly would be a violation of the regulation?

A. May I see the memorandum? I think the memorandum speaks best for itself. The first sentence, "You will note that on page 2 of the memo-

(Testimony of Herman A. Greenberg.)

randum Charles W. Triggs is quoted to the effect that he advised the French Sardine Company to violate GMPR and that he would quash any complaints that might be made because of the violation. It appears that the Los Angeles District Office took the exparte statement of an officer of the company as the basis for accepting single damages in settlement of the Administrator's treble damage action. On receipt of the memorandum we had a long discussion with Mr. Triggs. He assured us that at no time did he either recommend violation of the regulation or suggest that he might quash any proceedings for violation of the regulation."

The Court: But he was as you say sympathetic to their plight?

The Witness: Yes, sir.

The Court: And after they were caught short he [21] recommended the acceptance of the single penalty on the basis of what he had talked to them before?

The Witness: My recollection, sir, is that Mr. Triggs probably went a little further than that, and——

Mr. Wyshak: You don't know of your own knowledge, though?

The Court: Well, I mean, he is talking about this conversation with Triggs.

The Witness: I am speaking of my recollection, of course.

The Court: Tell us—I don't want to get dizzy. You are going around and around.

(Testimony of Herman A. Greenberg.)

The Witness: It is very difficult, sir.

The Court: I know it is difficult. But if you remember he went further, what did he say. I try to summarize what I take to be your narrative of the conversation.

The Witness: My recollection of what he said in that regard was that these people were decent people and kept him informed of the procedure they had taken, that his own feeling was that he could see no harm in this, but he——

Mr. Wyshak: No harm in what?

The Witness: In the sale of this fish at \$12 a case prior to the——

Mr. Wyshak: Over the ceiling? You mean see no harm in it?

The Witness: ——regulation.

The Court: Promulgation of the regulation?

The Witness: Yes, sir, because he had information that such a regulation had issued.

The Court: And told them of that?

The Witness: Yes. In other words, Triggs did not go so far to me as to say, "I told them to go ahead and do it and that if anything happened I would take care of it." That is an official statement he could not make——

The Court: As a Government official he could say, "Now, look, I think that regulation is going to be made;" but you can't tell them to anticipate it and act on it before it is made. It wouldn't be good governmental policy.

The Witness: I would agree with that. But whe-

(Testimony of Herman A. Greenberg.)

ther Triggs at this point adhered to the best governmental policy, I don't know.

The Court: Maybe somebody else who talked to Triggs may testify differently. That is the best of your recollection?

The Witness: Yes.

The Court: All right.

Q. By Mr. Wyshak: Then, just to summarize, as far as you know Triggs never told them it was all right for them to raise their prices, in so many words?

A. Just to summarize, I would say my recollection is that Triggs told them it wouldn't be so bad if they did.

The Court: It is a negative; almost like Amos and Andy. [23] All right.

Mr. Grady: May I ask one further question, your Honor?

The Court: Yes.

Redirect Examination

By Mr. Grady:

Q. Mr. Greenberg, was the acceptance of single damages a penalty against this company?

A. We did not so——

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: He has already testified that the policy was in the department, and it is the policy of the law that where you merely take back the overcharge, whether it goes to the Government indi-

(Testimony of Herman A. Greenberg.)

vidually, there is no penalty, merely taking back a transaction he had no right to make.

Mr. Grady: That is exactly what I intended to bring out, and——

The Court: That, however, is merely a conclusion to be drawn from the facts. And Mr. Greenberg has stated that my summary of the law was a correct one of what the policy was at that time.

Mr. Grady: I have no further questions.

The Court: All right.

The Witness: Thank you, your Honor. May I say, your Honor, that I have been at the bar for 21 years and this is [24] the first time I was a witness.

The Court: Well, I think you did pretty well. Most lawyers forget their role as a witness and try to be an advocate. I think you did very well.

I think this witness has flown here and if you want me to discharge him from the subpoena, I will release him. I don't know whether his plane——

The Witness: I would not be leaving this evening in any event.

The Court: As far as we are concerned you are through.

The Witness: Thank you, sir.

The Court: All right, call your next witness.

Mr. Grady: Your Honor, we have two other witnesses, the first of whom will be very short, I believe.

The Court: Put him on. Remember I have a lot of things to do, and as long as the case cannot be

finished today, let us put on a short witness and finished, because I probably have things to sign before I leave.

Mr. Mackay: We recognize that, your Honor. We will be glad to.

EARL M. NIELSEN

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Earl M. Nielsen, N-i-e-l-s-e-n.

Direct Examination

By Mr. Grady:

Q. Mr. Nielsen, during the period beginning 1941 until 1950 were you associated with the High Seas Tuna Company?

A. Yes, I was general manager of the High Seas Tuna Company.

Q. And who was president of that company?

A. Mr. Bogdonovich.

Q. Which Bogdonovich?

A. Martin Bogdonovich.

Q. In your capacity as general manager did you negotiate the ceiling prices your company had on canned fancy light meat tuna?

A. Yes, I did with the OPA in the San Diego branch office.

Q. What was your price basis on 48 halves, or on fancy light meat tuna?

Mr. Wyshak: I can't see the materiality for that.

The Court: Overruled.

(Testimony of Earl M. Nielsen.)

The Witness: We applied to the OPA for a ceiling, gave them the information they requested, and they in turn sent a deputy to go through the books and check our sales in March. They granted us a \$15 price. And that was in April. And then at the later date, 30 days later, came back again and re-checked, and as I recall there was a change in price at the [26] Sun Harbor Company, was reduced two dollars, and they reduced us down to an even break, \$14, too.

Q. Did it remain at \$14 until the new regulation came out in January 1943? A. Yes, it did.

Q. Now, to whom did you sell tuna during that period?

A. I sold tuna to the French Sardine Company, Inc., and through brokers to the trade.

Q. And what price did you sell to the trade through your brokers? A. \$14.

Q. And what price did you sell to the French Sardine Company? A. \$11.

Mr. Grady: I have no further questions, your Honor.

The Court: All right, Mr. Wyshak?

Mr. Wyshak: No questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Mackay: We have a witness, your Honor, whom I don't think we will get through with before 5:00 o'clock.

The Court: Does the Government have any testimony?

Mr. Wyshak: Not right now, your Honor.

The Court: I don't think we need rush. It can't be concluded tonight anyway, so we will take our regular [27] adjournment and then finish the testimony and I will hear what the Government has to say and then I will hear any argument you desire to present. So long as we have started, why, there is no rush.

All right, gentlemen, 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, January 7, 1955.) [28]

Friday, January 7, 1955; 10:00 a.m.

The Court: All right.

Mr. Grady: Your Honor, we have some documentary evidence we would like to introduce next.

The Court: All right.

Mr. Grady: There are 11 letters and telegrams in a group, all of which have been taken from the files of the Office of Price Administration, which are now reposed in the archives of the United States at Washington; and they have been certified. Copies have been furnished the Government several weeks ago. I don't know whether the Government has any objection to any of them or not. I would like to introduce them all as a group if it is agreeable to the Government.

The Court: I think it is better to do than individually so that the Government can determine whether they desire to object to any particular ones

or not. If you put them in a group you don't know. You may lose the benefit of one of them because another one may be bad.

Mr. Grady: Your Honor, I would like to hand you the original group so you may rule upon them as the Government makes an objection.

First I offer in evidence a telegram from the French Sardine Company to Charles M. Elkinton dated July 29, 1942.

Mr. Wyshak: Your Honor, may I inquire whether these [30] letters constitute the whole administrative file? If they do not I am going to object on the grounds that they are merely a portion of the administrative file, and we don't have the file.

The Court: That is not a good valid objection. The Government is free to offer the rest. It is **not** incumbent upon any litigant to offer anything but those things that they think bear upon the matter. The opponent, especially an opponent who has possession of these matters, had the opportunity of offering the others.

Mr. Grady: May that be admitted, your Honor?

The Court: It may be received, and the letter or telegram identified will be given a number. We will take the first one at the top.

The Clerk: Exhibit No. 2 in evidence.

(The document referred to, marked Plaintiff's Exhibit 2, was received in evidence.)

[See page 200.]

Mr. Grady: As Plaintiff's Exhibit No. 3, your

Honor, I offer a telegram from the French Sardine Company to Charles M. Elkinton dated August 10, 1942.

The Court: All right. It may be received.

The Clerk: That's Plaintiff's Exhibit No. 3 in evidence.

(The document referred to, marked Plaintiff's Exhibit 3, was received in evidence.)

[See page 201.]

Mr. Grady: As Plaintiff's Exhibit No. 4, your Honor, [31] a letter from A. T. Williams of the French Sardine Company to the Office of Price Administration dated September 2, 1942.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 4 in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 4, was received in evidence.)

[See page 202.]

The Court: That letter has two pages.

Mr. Grady: Yes.

The Court: Two pages and an exhibit.

Mr. Grady: As Plaintiff's Exhibit No. 5, your Honor, I offer in evidence a three-page letter from A. T. Williams of the French Sardine Company to Charles W. Triggs, Head, Canned Fish Section, Office of Price Administration, dated September 24, 1942.

Mr. Wyshak: Your Honor, with respect to that exhibit and the previous one, I assume they are only being admitted for the purpose of what the plain-

tiff's intent was rather than the truth of the matters asserted therein.

The Court: That is right. All of these bear to the absence of intent to violate the law so as to lay a factual foundation for the argument that the penalty paid in the civil suit by the OPA was a legitimate business expense which should be deducted.

Mr. Grady: As Plaintiff's Exhibit No. 6, your Honor,— [32]

The Clerk: Just a moment. Is that exhibit received?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 5 in evidence.

The Court: The letter of September 24th. It has three pages.

(The document referred to, marked Plaintiff's Exhibit 5, was received in evidence.)

[See page 205.]

Mr. Grady: As Plaintiff's Exhibit No. 6, I offer in evidence a three-page letter from A. T. Williams of the French Sardine Company to Charles W. Triggs, Head, Fish Section, Office of Price Administration, dated November 6, 1942.

Mr. Wyshak: I would like to object to that on the grounds that it is self-serving, hearsay, immaterial and irrelevant since it contains argument in there after the sales that were made over the ceiling price.

The Court: Objection overruled.

The Clerk: Plaintiff's Exhibit No. 6 in evidence.

(The document referred to, marked Plaintiff's Exhibit 6, was received in evidence.)

[See page 208.]

Mr. Grady: As Plaintiff's Exhibit No. 7, your Honor, I offer in evidence a two-page letter from Mr. A. T. Williams, French Sardine Company, to Mr. Charles W. Triggs of the Office of Price Administration, dated November 6, 1942.

Mr. Wyshak: Same objection, your Honor.

The Court: Objection overruled. It may be received. [33]

The Clerk: No. 7 in evidence.

(The document referred to, marked Plaintiff's Exhibit 7, was received in evidence.)

[See page 210.]

Mr. Grady: As Plaintiff's Exhibit No. 8, your Honor, I offer in evidence a letter from A. T. Williams of the French Sardine Company to the Office of Price Administration, 1037 South Broadway, Los Angeles, California, dated November 16, 1942.

Mr. Wyshak: Same objection.

The Court: Denied.

The Clerk: That is No. 8 in evidence.

(The document referred to, marked Plaintiff's Exhibit 8, was received in evidence.)

[See page 213.]

Mr. Grady: As Plaintiff's Exhibit No. 9 I offer in evidence a handwritten letter of A. T. Williams to Charles W. Triggs, dated December 5, 1942, enclosing several other letters.

Mr. Wyshak: Same objection.

The Court: Overruled. Received in evidence.

The Clerk: Exhibit No. 9 in evidence.

(The document referred to, marked Plaintiff's Exhibit 9, was received in evidence.)

[See page 215.]

Mr. Grady: As Plaintiff's Exhibit No. 10 I offer in evidence a three-page letter from A. T. Williams, French Sardine Company, to the Office of Price Administration, [34] dated December 5, 1942. This letter is addressed to the Office of Price Administration, 1037 South Broadway, Los Angeles, California.

Mr. Wyshak: Same objection, your Honor.

The Court: Objection overruled.

The Clerk: Plaintiff's Exhibit No. 10 in evidence.

(The document referred to, marked Plaintiff's Exhibit 10, was received in evidence.)

[See page 215.]

Mr. Grady: As Plaintiff's Exhibit No. 11, your Honor, I offer in evidence a one-page letter from A. T. Williams of the French Sardine Company to Charles W. Triggs, Office of Price Administration, Washington, D. C., dated April 29, 1943.

Mr. Wyshak: Same objection.

The Clerk: Is that admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11 in evidence.

[See page 219.]

Mr. Grady: As Plaintiff's Exhibit No. 12 I offer in evidence a letter from Charles W. Triggs to Mr. A. T. Williams of the French Sardine Company dated May 6, 1943.

Mr. Wyshak: Same objection, your Honor.

The Court: Objection overruled. It may be received.

The Clerk: Exhibit No. 12 in evidence.

(The document referred to, marked Plaintiff's Exhibit 12, was received in evidence.)

[See page 220.] [35]

Mr. Grady: As Plaintiff's Exhibit 13, your Honor, I offer a four-page letter addressed to Mr. Triggs and signed by A. T. Williams of the French Sardine Company, dated May 6, 1943.

Mr. Wyshak: Same objection.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit No. 13.

(The document referred to, marked Plaintiff's Exhibit 13, was received in evidence.)

[See page 221.]

Mr. Grady: As Plaintiff's Exhibit 14 I offer in evidence a letter dated May 19, 1943, from Mr. Charles W. Triggs to Mr. A. T. Williams of the French Sardine Company.

Mr. Wyshak: Same objection.

The Court: Objection overruled. Received in evidence.

The Clerk: That is Plaintiff's Exhibit No. 14, in evidence.

(The document referred to, marked Plaintiff's Exhibit 14, was received in evidence.)

[See page 225.]

Mr. Grady: As Plaintiff's Exhibit No. 15, your Honor, I offer in evidence a letter dated—well, it really has two dates on it, one typed in, I believe, is July 7, 1943, and another stamped in is July 9, 1943.

The Court: The date received.

Mr. Wyshak: Same objection.

Mr. Grady: It is from Charles W. Triggs to Mr. A. T. [36] Williams of the French Sardine Company.

The Court: All right. Objection overruled, Received in evidence.

The Clerk: That's Plaintiff's Exhibit 15 in evidence.

(The document referred to, marked Plaintiff's Exhibit 15, was received in evidence.)

[See page 226.]

Mr. Grady: Your Honor, we would like to read those letters to the court if it be permissible.

The Court: Well, I don't want it as part of this. You can do it as part of the argument. Pick out the things you want. I don't like to stop, even when I try cases to the jury. You can do it as part of the argument. Either in the record, be transcribed in the record to be prepared and I will read them. I haven't time to read them this morning at the rate you have put them in, but I will read them before I decide the case.

Mr. Grady: Surely. Now, your Honor, as our next group of exhibits we would like to offer in evidence several of the regulations promulgated by the Office of Price Administration, all of which are recorded in the Federal Register. And for the convenience of the court we have attempted to have copies made of those which we think are pertinent so your Honor would have them available.

I apologize for the copies in a couple of instances. We have had to have pages of the Federal Register photostated and [37] they didn't turn out too well. But we did the best we could.

As our next exhibit, which I believe is No. 16, I offer in evidence a photostatic copy of the General Maximum Price Regulation, your Honor, which was issued on April 28, 1942.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 16 in evidence.

(The document referred to, marked Plaintiff's Exhibit 16, was received in evidence.)

Mr. Grady: As the next exhibit, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation No. 184, which was issued on July 23, 1942.

Mr. Wyshak: What did that have to do with?

Mr. Grady: Sales by canners of Maine sardines.

Mr. Wyshak: I think that is irrelevant and immaterial. We are only concerned with tuna.

The Court: I would have to look at that.

Overruled. Of course, the court takes judicial notice of the regulations, but as I have stated to

you gentlemen the cases relating to them are so rare that it is helpful if counsel puts them in the record, the particular regulation, rather than just have us go to books and have us dig them out. Ultimately we take judicial notice of such regulations, and we have a complete set of the Federal Register.

The Clerk: Is that admitted, your Honor? [38]

The Court: It may be received.

The Clerk: That's 17 in evidence.

(The document referred to, marked Plaintiff's Exhibit 17, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 18, your Honor, I offer in evidence a photostatic copy of Regulation No. 209, which was effective August 31, 1942.

Mr. Wyshak: Same objection, your Honor.

The Court: It may be received.

Mr. Wyshak: Has to do with California sardines.

The Court: It may be received.

The Clerk: That's Plaintiff's Exhibit 18 in evidence.

(The document referred to, marked Plaintiff's Exhibit 18, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit 19, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation 237, which became effective October 15, 1942. Your Honor, this price regulation fixed the manner of computing the price at which wholesalers would sell their products.

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Clerk: That's Plaintiff's 19 in evidence.

(The document referred to, marked Plaintiff's Exhibit 19, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 20, I offer in [39] evidence a photostatic copy of the Maximum Price Regulation No. 247, which was issued on October 24, 1942, dealing with domestic canned crab meat.

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit 20.

(The document referred to, marked Plaintiff's Exhibit 20, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 21, your Honor, I offer in evidence a photostatic copy of the Maximum Price Regulation No. 252, which was issued on October 30, 1942.

Mr. Wyshak: Same objection. It has to do with vinegar-cured herring. I can't see what relevancy that has to do with this case.

The Court: It may be received.

The Clerk: That's Plaintiff's Exhibit 21 in evidence.

(The document referred to, marked Plaintiff's Exhibit 21, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 22, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation No. 265, which was issued on November 9, 1942, dealing with sales by canners of salmon.

Mr. Wyshak: Same objection, your Honor.

The Court: It may be received.

The Clerk: That's Plaintiff's Exhibit 22 in evidence. [40]

(The document referred to, marked Plaintiff's Exhibit 22, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 23, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation No. 277, which was issued on November 28, 1942, dealing with sales by canners of mackerel.

Mr. Wyshak: Same objection, your Honor.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 23 in evidence.

(The document referred to, marked Plaintiff's Exhibit 23, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 24, your Honor, I offer in evidence Maximum Price Regulation 299, which was issued on January 7, 1943, which fixed the prices for sales by canners of tuna, Bonita and yellowtail. That's the regulation which ultimately raised the price of our product from \$11 to \$12.

Mr. Wyshak: Your Honor, I will object to that on the grounds that it is incompetent and immaterial since we are only concerned with what the regulations were and what the ceiling price was which was in effect at the time the sales were made. This regulation is subsequent to those sales.

The Court: Overruled. But in view of the fact there is evidence to show there was some discussion as to a possible increase in price, and people acted upon the assurance that [41] such an increase was being considered, they bear on good faith.

The Clerk: Is this admitted then, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 24 in evidence.

(The document referred to, marked Plaintiff's Exhibit 24, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 25, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation 366, which was issued on April 13, 1943, and fixes the price of fresh tuna; that is, the raw tuna, manufacturer's raw product.

The Court: It may be received.

Mr. Wyshak: I object, your Honor, as irrelevant and immaterial.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit No. 25 in evidence.

(The document referred to, marked Plaintiff's Exhibit 25, was received in evidence.)

Mr. Grady: Your Honor, as Plaintiff's Exhibit No. 26, I offer in evidence three other documents which I think this court would take judicial notice; the first being a photostatic copy of a complaint filed in this court on June 3, 1943, entitled Prentice M. Brown, Administrator, Office of Price Administration vs. French Sardine Company, Inc., No. 2960-BH.

The Court: It may be received. [42]

The Clerk: Plaintiff's Exhibit 26 in evidence.

(The document referred to, marked Plaintiff's Exhibit 26, was received in evidence.)

[See Page 227.]

Mr. Grady: As Plaintiff's Exhibit No. 27, your

Honor, I offer in evidence a stipulation filed on the same day in that same cause.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 27, in evidence.

(The document referred to, marked Plaintiff's Exhibit 27, was received in evidence.)

[See page 229.]

Mr. Grady: And as Plaintiff's next exhibit I offer in evidence the judgment entered on that same day, a consent judgment entered that same day in this same cause.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 28 in evidence.

(The document referred to, marked Plaintiff's Exhibit 28, was received in evidence.)

[See page 230.]

Mr. Grady: As Plaintiff's Exhibit No. 29, your Honor, I offer in evidence a retained copy of Plaintiff's corporation income and declared valuation excess profits tax return, Form 1120, for the taxable year ending May 31, 1943.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 29 in evidence.

(The document referred to, marked Plaintiff's Exhibit 29, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 30, your Honor, I offer in evidence a retained copy of Plaintiff's corporation excess profits tax return Form 1121, for the taxable year ended May 31, 1943.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 30 in evidence.

(The document referred to, marked Plaintiff's Exhibit 30, was received in evidence.)

Mr. Mackay: At this time, if your Honor please, we would like to call Mr. John Morris.

Take the witness stand, Mr. Morris.

JOHN V. MORRIS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: John V. Morris, M-o-r-r-i-s.

The Clerk: Thank you.

Direct Examination

By Mr. Mackay:

Q. What is your occupation, Mr. Morris?

A. Attorney—used to be.

Mr. Mackay: You are retired now?

The Witness: Well, I am ill now, and I haven't been able to work for some time. [44]

Q. By Mr. Mackay: Well, were you general counsel of the French Sardine Company?

A. Yes.

Q. From what date?

A. Oh, in my office in San Pedro I did some work for French Sardine on occasions for some years prior to May 1, 1937, and on May 1, 1937 I dissolved my partnership with Charles P. Johnson

(Testimony of John V. Morris.)

and went to the French Sardine Company and was employed continually from May 1, 1937.

The Court: Was that the Charles Johnson that became a municipal court judge?

The Witness: Yes, he became a municipal court judge, that is right.

The Court: All right. Go ahead.

Q. By Mr. Mackay: How long did you stay with them? How long were you general counsel of French Sardine Company? You got there in 1937.

A. Until about a year ago—may be.

Q. And you were general counsel during the year 1942? A. Yes.

Q. And at that time who was the president of the French Sardine Company?

A. Martin J. Bogdonovich.

Q. And was he a United States citizen?

A. He was a citizen of the United States. [45]

Q. Naturalized or native?

A. Naturalized.

Q. When the war broke out in 1942 do you know whether or not Mr. Bogdonovich took an active part in the war effort with respect to selling bonds?

A. He did immediately take a very active part and wanted to assist in every way possible; and contacted me and requested me what could be done, to tell him what could be done.

Q. Well, what did he do?

A. I suggested that he donate \$5,000 to the Navy Relief in Long Beach, and we contacted Capt. Kauf-

(Testimony of John V. Morris.)

man, I think the name was. He was in charge of that big center they had in Long Beach. And he in turn contacted the chaplain. I think the chaplain's name was Johnson. And we arranged to present Capt. Kaufman with this check for \$5,000, which I believed was turned over to the Navy chaplain for Navy relief.

Q. Was that right at the outbreak of the war?

A. Yes, that was the very beginning. Then Christmas of that year came along and I suggested that it would be nice if we sent some things to the boys at the base in San Pedro. And I think that I ordered—I know we sent them one great big case of cigarettes and sent them numerous articles as a Christmas present for them to this officer who was in charge of that base in San Pedro. [46]

Q. Now, what did Mr. Bogdonovich do with respect to the bond drive?

Mr. Wyshak: Your Honor, I think all of this is irrelevant and immaterial.

Mr. Mackay: This is preliminary.

The Court: Well, I don't—

The Witness: He worked hard on that and dropped dead during one of those bond speeches.

The Court: That is not material. I think what he did with respect to the general business is more interesting than his general attitude.

Mr. Mackay: Yes, sir.

Q. By Mr. Mackay: May I ask you, Mr. Morris, when Mr. Bogdonovich died?

A. When he died—what?

(Testimony of John V. Morris.)

Q. I beg your pardon?

A. What was the question concerning his death?

Q. I asked you if he is dead?

A. Yes, he is.

Q. When did he die?

A. I wouldn't remember the exact date.

Q. Do you know under what circumstances?

A. Yes.

Q. Please tell us.

A. Mr. Bogdonovich had arranged for a celebration and [47] for the appearance of a——

Mr. Wyshak: Your Honor, I think this is irrelevant and immaterial.

The Witness: ——prominent radio commentator at the Yugoslavia Club in a U. S. bond drive——

The Court: We don't need to go into that.

The Witness: Well, during the course of this bond selling speech he dropped dead.

Q. By Mr. Mackay: Now, Mr. Morris, you knew Mr. A. T. Williams, did you?

A. Very well.

Q. And what position did he hold with the French Sardine Company?

A. Salesmanager.

Q. And is he still alive, or is he dead?

A. No, he died.

Q. Now, as general counsel of the French Sardine Company, Mr. Morris, was it your duty to advise the company with respect to the Price Control Act? A. Yes.

Q. And did you so advise them? A. Yes.

(Testimony of John V. Morris.)

Q. Were you consulted with respect to the ceiling price that the French Sardine Company should use? A. Yes. [48]

Q. What advice did you give them at that particular time?

A. That I was of the opinion—Doc Williams, rather came up with the idea that the nearest canner was Van Camp's seafood company. We had always, apparently—Doc Williams and M. J. Bogdonovich looked with a great deal of respect upon Van Camp's seafood company, and occasionally undertook to compare ourselves with them. And apparently the first thing that came to their mind was in view of the fact we had no sales in March that we were comparable to Van Camp. I did not agree.

Q. You did not agree? A. Yes.

Q. Then did you so advise them?

A. Yes. But then sometime within a close period of time there, M. J. Bogdonovich came to me and explained to me—well, maybe that will come later. That's all.

You will have to forgive me. I am not too clear.

The Court: That's all right. Take your time. If you don't feel very well and want to stop, just let us know.

Mr. Mackay: Maybe if I stand a little closer, your Honor,—and I will speak a little louder.

The Court: I remember when you were active, Mr. Morris, and I am very sympathetic to anyone that is in ill health. That comes to all of us. [49]

The Witness: You remember when I was active

(Testimony of John V. Morris.)

in your court? You remember the case of Sandburg against Sandburg years ago?

The Court: That's right.

Q. By Mr. Mackay: Now, Mr. Morris, you said that you advised them that Van Camp's was not comparable. A. Yes.

Q. Did you give them your advice as to what you thought was comparable?

Mr. Wyshak: Your Honor, I object to this as immaterial and irrelevant. The ceiling has been established. The violation has been established; and there is no necessity for going into this at all.

The Court: If there isn't, it might as well be a judgment in your favor; and I can't do that until after I have heard the evidence.

You see, I have already familiarized myself enough with the case to see that there is a course of conduct right here verified by officials—in fact, one of the reasons I wanted to look at the letters, I do so much writing I have what you call a proof-reader's eye. I can glance at the page and take it in. That is why I can read so fast. And I notice in the early correspondence here the facts are brought to the attention that they are doing all this under the expectation, whether it is a promise or not, that an adjustment will be [50] made. And then in one of the first letters there—I think it is Exhibit 3; the three-page letter after the two telegrams; I think it is Exhibit 4—they notified the Office of Price Administration that while they are waiting for an adjustment, which they said they would

(Testimony of John V. Morris.)

probably make, they are putting a stamp on each invoice, which ties to the invoice which was introduced yesterday. So you have got a complete course of conduct, and it is always permissible to show intent by a course of conduct. So these are links in the chain to show at all times these people were acting under the impression that an adjustment would be made; that they notified their clients that if the adjustment isn't made there would be a refund. And if that isn't admissible, you might as well quit.

Mr. Wyshak: I don't deny, your Honor, that the intent prior to the time that these violations were made is relevant and should go in. What I am saying is they should not have a chance to relitigate here——

The Court: They are not relitigating at all. You have got your own man. Your own man said they practically made them a promise that they would reduce it. This is a case where you own top official—maybe you have someone who will contradict him—the top official said he felt at all times that this was one of those fortuitous situations; and the fact that the change came right after this bears upon this. And if that isn't permissible then we might as [51] well not litigate.

Mr. Wyshak: Well, your Honor, I don't question the bona fideness. What I mean is this: When they sold this tuna they knew what the ceiling was——

The Court: I know what you contend because I have read your memorandum, and I know what

(Testimony of John V. Morris.)

your contention is, and I will rule on your contention when I am through. And I am not through yet. I don't know what your evidence is going to be.

Mr. Mackay: Could you read that question?

(Question read.)

The Witness: Yes. I thought one of the other packers like Coast Fishing Company in Wilmington, which is a few miles from their plant in the same harbor, or West Gate Seafood in San Diego, due to their size and due to our size, and tuna packing, would be more comparable or nearer competitors of ours.

Q. By Mr. Mackay: Did you advise them that they could use the—sell their tuna to any other company? A. Yes.

Q. What company?

A. High Seas Tuna Packing Company.

Q. Will you please tell the court why you advised them on that?

A. Because I was informed by the manager of that company, Mr. Nielsen, who was on the stand yesterday, that [52] they had a price ceiling of \$15 a case of 48 fancy, light-meat tuna, and I understood that that ceiling was in effect for about a month after April 28, 1942, and then that subsequently it was reduced by OPA to \$14, and that they had an established \$14 ceiling over a period of time, which was \$3 more than the ceiling that they insisted on adopting from Van Camp's.

Q. Now, who controlled the High Seas?

A. High Seas Tuna Packing Company was in-

(Testimony of John V. Morris.)

corporated by me for M. J. Bogdonovich and some others in July of 1941; and at that time I asked for the issuance, I think, of about \$865,000 worth of stock to the Fishermen's Tuna Packing Company, I think it was called, in San Diego, which became High Seas later; and I think \$47,000 worth of stock to M. J. Bogdonovich. And then there was further negotiations being carried on by M. J. Bogdonovich towards acquiring more of the stock of the new corporation that succeeded the Fishermen's Tuna Packing—the High Seas Tuna Packing Company, and that in June he did acquire, or had committed 152 shares. And then more shares, as time went on, were acquired by him—exactly how much, I do not know. And this gave Mr. Bogdonovich personally approximately about a 40 per cent, 42 per cent, or somewheres around there in the time that is involved here, interest in High Seas Tuna Packing Company.

And I heard Nielsen tell what ceiling prices he had, and [53] as I understood he got them from some local sales that he had made during the month of March in the San Diego area. And I suggested to Mr. Bogdonovich, in view of the fact they thought that their ceiling was \$11, and that didn't give them much margin, and with the price of fish continually going up, they wouldn't know where the devil they were at and what they could sell for, that it might be advisable for him as the principal owner of the French Sardine and a substantial owner of High Seas Packing Company, to channel

(Testimony of John V. Morris.)

his fish and to channel the Fishermen's Tuna Packing Company fish, which he was sales agent, or which he sold to French Sardine Company, rather than permit them to handle it all, and let Nielsen sell that fish to the Fishermen's Tuna Packing for their ceiling, which would give him \$3, and would still give him more money to his transaction for French Sardine Company and French Sardine Company instead of being on a ragged edge would have a 10 per cent brokerage commission from the fish sold for High Seas Tuna Packing Company. And I thought that was a good deal to keep him balanced.

Q. What did he say about that?

A. Oh, he wouldn't hear of it. And he was sort of a temperamental man, and I am inclined to think he blew up at me for such a suggestion.

Q. Did he tell you why he didn't want to do it?

A. That he didn't want to profiteer, that he had his [54] brokers with whom he had established reputations over a period of years, and that he wanted to deal with them, and that he wanted to handle his fish for French Sardine Company. Even if he made less money he was happy if he could do that.

Q. Now, Mr. Morris, do you know whether or not there was a voting trust on the High Seas stock executed?

A. Yes, there was.

Q. Did you prepare it?

A. Yes, I prepared a draft of the voting trust for High Seas Tuna Packing Company. And it was practically a draft of the voting trust as contained

(Testimony of John V. Morris.)

in the form part of Ballantine on California Corporations; altered by me to conform with the situation of the High Seas Tuna Packing Company. This draft I took to San Diego and presented to Jerry Driscoll of Drake, Carey, Ames & Driscoll, who was the attorney for the Fishermen's Tuna Packing Company, and later became attorney for High Seas Tuna Packing Company.

Mr. Wyshak: Your Honor, may I have a continuing objection to this on the grounds that it is irrelevant and immaterial, subject to a motion to strike?

The Court: All right.

The Witness: And this voting trust was later executed.

Q. By Mr. Mackay: I hand you a document here which is headed "Voting Trust." I ask you to please examine this and tell us whether or not that is a copy—— [55]

A. I have already examined this and I recognize it from Mr. Driscoll's signature. And this is the voting trust we settled upon based upon my draft.

Mr. Mackay: I would like to have this marked for identification.

The Court: It may be received.

The Clerk: Is this being offered, or merely to be marked?

Mr. Mackay: Well, I may as well offer it in evidence.

Mr. Wyshak: I object, your Honor, on the grounds that it is irrelevant and immaterial.

(Testimony of John V. Morris.)

The Court: Received.

The Clerk: Plaintiff's Exhibit 31 in evidence.

(The document referred to, marked Plaintiff's Exhibit 31, was received in evidence.)

Q. By Mr. Mackay: Now, Mr. Morris, as general counsel of the French Sardine Company in 1942, and particularly the late spring and summer, and during the latter part of the year or during the rest of the year, did you have conferences with Mr. Bogdonovich and Mr. Williams with respect to this attempt of the French Sardine Company to negotiate with the Government for a higher ceiling than \$11?

A. Well, I would like to explain our method of operation in the French Sardine Company.

Mr. Wyshak: That can be answered yes or no, your Honor. [56]

The Witness: If I could. And then from that—

The Court: Yes. Well, you may answer yes or no, and then you may explain your answer.

Mr. Mackay: Then you go ahead.

The Witness: I have lost the question.

Mr. Mackay: Well, I will reframe it.

The Witness: No. It may have been framed properly; just that I slip sometimes.

Mr. Mackay: Would you read it, then?

(Question read.)

The Witness: I would say almost daily conferences, as we ran a sort of small operation in respect to our business. In other words, Mr. Bogdonovich, Mr. Williams, Mr. Jerry Shear and one

(Testimony of John V. Morris.)

or two of the Kravathivich brothers, myself and Joe Bogdonovich would sit around an old desk in a so-called sales office and Doc Williams would read all of the correspondence that he judged important every morning when M. J. Bogdonovich would come to the cannery. And then Doc Williams would be advised as to how he was to answer because he handled practically all of the—he did handle all the important correspondence. And then we would discuss the various things that came up. And one of the things that was under fairly constant discussion was this so-called price ceiling. And Doc's contacts with Triggs, his phone calls with Triggs, his correspondence with Triggs—as I remember it, [58] Doc stating as to what Triggs said to him, especially with respect to the price ceiling, and that we thought—then that Doc thought that it was all right to go ahead and base our prices at \$12.

Q. By Mr. Mackay: May I ask you this, Mr. Morris: Were you consulted by the management of the French Sardine Company with respect to those conferences?

A. At those conferences I was constantly, you might say, consulted, and I was supposed to speak up if something needed correction within my scope of knowledge.

Q. May I ask you if the invoices which were sent out I think sometime in September—

A. Yes.

Q. Which contained words to this effect that there would be a refund of a dollar a case in the

(Testimony of John V. Morris.)

event that OPA had not granted the requested increase—— A. Yes.

Q. ——was that sent out at your advice?

A. It was brought out at one of these so-called daily meetings, and I think that Doc Williams drew the provision and asked me if I thought it was proper, or if I had any idea about changing it.

Q. What was your advice?

A. My advice, that I thought that it was perfectly proper and I based that upon many reasons.

Q. What are they?

A. We were always reading about pronouncements. I have in mind now one pronouncement that was brought back to my attention in the correspondence that I think was just introduced in evidence, a statement to, I believe, Doc Williams and these other people, and they were gathered in Washington at a meeting by Secretary Wickers to the respect that these regulations were hastily drawn; that they were recognized to be imperfect; that they were subject to correction.

Mr. Wyshak: I think the question has been answered. There is no question pending.

The Court: Go ahead. He may give an explanation.

The Witness: And that there would be many inequalities, or words to that effect, that many canners would be hurt, that these would be eliminated or worked out as time went on. And that we could not let these inequalities stand—or these regulations stand in the way of production—which led

(Testimony of John V. Morris.)

me to believe that OPA would correct anything that was wrong, because that was the pronouncement from there.

Then also I think there is another letter in that correspondence which was in line with Doc Williams telling us that Triggs was telling him that there was a conference between officials in Washington——

Mr. Wyshak: These letters speak for themselves. [59]

The Court: Well, that is all right. We will go to the letters in greater detail.

The Witness: This is what motivated me, your Honor.

The Court: All right. You want us to stop for a minute?

Mr. Mackay: Yes.

The Court: Let us stop for a minute. Go ahead, you may step down.

I want to make an observation here for the record. One of the advantages one has in a case of this character is having gone through this type of period of litigation. So I am going to call attention to an opinion of mine dealing with the problem which will show how constantly the procedures and the Government were disputing the question as to what base shall be used as a foundation for the establishment of a ceiling, what comparable product should be brought in.

The case I refer to is *Boyles, Price Administrator vs. Wilson & Company*. It is reported at 63 Fd.

(Testimony of John V. Morris.)

Sup. 687. The Price Administrator had sued Wilson & Company, one of the packers, for the sum of \$79,117.68, in the main sum, plus the trebling of damages, plus other relief. The basis of their contention was that Wilson & Company had sold 23 cents for an all-vegetable margarin in the Los Angeles area. The entire contention was that the base they had chosen was the wrong base. The Government contended that they should have chosen a margarin which was in the market at the time. [60] This margarin that they were selling was an all-vegetable margarin. It was a new product. And the margarin which had been sold prior to that time was made of, chiefly of animal fats. The Government said, "That is the product by which you should go." And I said no. And the Government lost. I do not know whether they appealed. If they appealed they lost, too.

And this is the argument: The Administrator's chief contention that the price was excessive is grounded on the proposition that the all-vegetable oleomargarin which the defendant sold in 1944 was the same or an identical product as an animal and vegetable margarin, which the defendant manufactured at Los Angeles and sold at the lower price in March 1942, the base period chosen for the fixing of the price; and which contained 70 per cent of the animal fat; GMPR 2. That's the regulation.

And then I said I believe the court must take judicial notice of the fact that in the matter of evidence an all-vegetable product cannot be compared

(Testimony of John V. Morris.)

with a partly animal and partly vegetable product, and with the animal fats amounting to 70 per cent; and the evidence in the record shows the difference between the two. After all, to say that both are edible doesn't solve the question. Nor is the question solved by attempting to show that they are as palatable to some people. The truth of the matter is that an edible product [61] like oleomargarin made chiefly of animal fat is not the same as or similar to GMPR 2 (a) (2); one made entirely of vegetable ingredients. The fact that both are used as spread and may be a poor man's substitute for butter is of little consequence. It is as unrealistic to claim identity for them as it would be to claim identity for Crisco or other all-vegetable shortenings and shortenings composed entirely or partly of lard merely because they are both used for the same purpose of shortening.

“* * * The Administrator's chief contention that the price was excessive is grounded on the proposition that the all-vegetable oleomargarine, which the defendant sold in 1944, was the same or an identical product as an animal and vegetable margarine, which the defendant manufactured at Los Angeles and sold at a lower price in March 1942, the base period chosen for the fixing of the price, and which contained 70 per cent of animal fat (GMPR. 2). I believe the court must take judicial notice of the fact that, in the matter of edibles, an all-vegetable product cannot be compared with a partly animal and partly vegetable product in which the animal fats

(Testimony of John V. Morris.)

amount to 70 per cent. And the evidence in the record shows the differences between the two. After all, to say that both are edible does not solve the question. Nor is the question solved by attempting to [62] show that they are as palatable to some people. The truth of the matter is that an edible product, like oleomargarine made chiefly of animal fat, is not the same as, or similar to (GMPR 2(a)(2), one made entirely of vegetable ingredients. The fact that both are used as spreads and may be a poor-man's substitute for butter is of little consequence. It is as unrealistic to claim identity for them as it would be to claim identity for Crisco or other all-vegetable shortenings and shortenings composed entirely or partially of lard, merely because they are both used for the same purpose—shortening: I am quite certain that a physician or dietitian who placed a patient on an all-vegetable diet forbidding him to eat animal fats would be shocked if he were informed by the patient that instead of an all-vegetable margarine, he had chosen to eat a margarine consisting of 70 per cent animal fats, because they were both the same. This is not a case where a processor, by increasing certain ingredients, changes a blend, such as occurred in the instance suggested by the Administrator—the coffee blend (OPA Service, p. 11: 1024). The Administrator, himself, has ruled that the addition of Vitamin A to margarine makes it a new commodity, distinct from non-vitamin margarine (Report 286, 42, 418.11). An all-vegetable [63] product manufactured in lieu of a combination

(Testimony of John V. Morris.)

animal-vegetable product is a new product in law and in fact. And as GMPR 1499 does not contain a definition of 'same commodity,' the matter becomes one for judicial interpretation.

"Interpretations by the Administrator are not given the force of law. Only regulations have such force. And no other administrative regulation has been called to my attention, which would deny to such product its quality as new.

"The contention to the contrary—absent a binding regulation—calls for rejection on the basis of the realistic facts already referred to, even if we take into consideration the definition of 'similar commodities' contained in note to GMPR 1499.2."

I am calling to your attention this fact in order to emphasize that there was a constant bickering going on back and forth between the Administrator and processor, not the little guys, but the big guys—Wilson & Company, one of the big four, or big six packers—as to whether there was violation or not. And we were called upon at all times to interpret whether a proper base had been used.

So in view of that fact it is quite evident that we have a right in order to determine whether this was a fine imposed upon a willful violator, so that it is not deductible, or if it is one of those fortuitous things resulting from an [64] honest difference of opinion as to whether a proper charge was made.

And I could give you more. I have written five or six—I have forgotten about them. I had to go through my book to remember the title of them be-

(Testimony of John V. Morris.)

cause I wrote so many of them. In Jung, to show you the problems we had imposed, a very interesting problem was involved. It involved the wholesale market which operates in Los Angeles; and the wholesale market which operates from the hours of about 11:00 o'clock at night until 4:00 o'clock in the morning; a place where the retailer goes and buys his product. You go and see a box of oranges and you buy 50 boxes. And the owner of the stand transports by truck, by hand truck to the vehicle of the buyer. The vehicle of the buyer is located about three or four blocks from the place. A very interesting question arose.

The OPA regulation said that they were entitled, that the wholesaler of produce, of oranges,—no, I think it was——

Get me the case. It was a very interesting case to show you the problems that arose. This wasn't as easy as those who haven't gone through the process of adjudicating these matters. They think now in retrospect.

It is 57 Fed. Supp. 701, Bowles vs. Jung, a Chinese. I think it involved tangerines. And they provided a different price for tangerines if the tangerines were delivered. [65] So the OPA arbitrarily said that delivery meant delivery at a distance, that delivery three blocks away wasn't delivery at all. So they sued. And let me see. Oh, they always sued in millions, you know. Let us see what they sued for. It is a very lengthy opinion. This is just a memorandum.

(Testimony of John V. Morris.)

Incidentally, Mr. Breitenbach appeared in that case. And by that time he had left. But his assistant who was in the case, William U. Handy and Miss Arlene Martin are still in the Government service, and they were with him.

There were several problems involving the case, and one of them was whether that was transportation. It was a long case. The judgment was for Bowles on other matters, but against him on that contention.

This is from *Bowles vs. Jung*, 57 Fd. Supp. 701. I am reading from page 706.

"The Administrator challenges the mark-ups in this and the other transaction, upon the ground that the defendant charged for deliveries which were made within a short distance, not exceeding, at the most several blocks within the same area. The Administrator urges that his office has interpreted 'delivery' not to include deliveries within the same market. But, the regulation does not define 'delivery.' Therefore, the word must be given its ordinary legal sense. Under the law of sales, title to the goods passes at [66] once to the buyer if an agreement is executed.

"If the seller is required to deliver the goods at a place designated by the buyer, title does not pass until delivery has been made.

"The California Uniform Sales Law provides:

" 'If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transporta-

(Testimony of John V. Morris.)

tion to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.'

"This is especially true in sales between merchants which contain F.O.B. provisions. Title, in such instances, does not pass until delivery at the point of shipment. The goods are at the risk of the seller until they are put on board.

"In the meantime, full responsibility rests upon the seller. If the goods are destroyed in transit, the sale is not completed and the loss is the seller's. And this principle applies whether the delivery is made two blocks away by an employee of the produce company who carries a lug of tangerines on his shoulders, or several lugs on a hand-truck or dolly which he wheels through the market, or whether he [67] delivers it by motor truck at a place designated by the buyer.

"The Administrator seems to think that no delivery is a delivery unless it is actually made at some great distance, at the buyer's place of business. Perhaps if the Administrator had so defined delivery, we might be compelled to adopt this interpretation, although it would do violence to the law of sales. For such a definition would force upon the seller the responsibility for the loss of the goods, the risk resulting from the use of his equipment by his own employees, including injuries to these employees and others, and, at the same time,

(Testimony of John V. Morris.)

would deny him the right to make a charge for the delivery which has these hazards.

“But the Administrator has not done so. My duty, therefore, as a judge, is to give to the word ‘delivery’ a meaning which conforms to the accepted legal principles. It is well to bear in mind the warning of Mr. Justice Douglas that, in carrying out the objects of the statute under which the regulation was written to prevent inflation, the Administrator ‘does not carry the sole burden.’

“The courts have a like responsibility, which must be exercised in the light of recognized legal [68] principles. Hence we cannot give to the word ‘delivery’ any other meaning than that which it has under known legal norms.

“The injustice of a contrary interpretation in this case is apparent.

“The market in which these men did business sprawls over many, many streets in the heart of the industrial district of Los Angeles, covering miles of territory. In the early morning, when the sales are made, the market is a conglomeration of piled up packing boxes, lugs and all sorts of containers filled with all kinds of fruits and vegetables. The floors are strewn with rejected fruits and vegetables. Water is running in all directions. The seller’s employee who carries or trucks a load of fruit through the market to the place designated by the buyer, runs the risk of slipping, damaging the fruit and injuring himself. And yet, we would, under the interpretation of the Administrator, make the seller

(Testimony of John V. Morris.)

assume all these burdens while denying him the right to charge for the risk so incurred.

“But the deliveries were not all of manual character. The evidence shows that, in many instances, deliveries were made on motor trucks of the buyers located several blocks away. This was especially true [69] in the case of chain stores which bought large quantities for sale at their individual stores. The transportation manager of one of these chains designated his company’s truck standing several blocks away from the defendant’s place of business as the place of delivery. The defendant’s motor truck, driven by one of his employees, had to be used in transporting the goods to the place. In transit, the responsibility not only for the safety of the merchandise, but also for any accident which might result in damage to the seller’s truck or to the property of others or injury to the driver or to any other persons was on the defendant. And the risk taken was just as great as if the delivery had been made twenty blocks away, at a store designated by the buyer.

“I conclude, therefore, that in sales where deliveries, in the sense here indicated, were made, the defendant had the right to the additional mark-up.”

I am pointing to the fact that we almost have to go into metaphysics in order to try to put sense into some of these regulations. So that it is quite important now when we find that the Government insists that some \$90,000 that was paid cannot be recovered because they are foreclosed by the fact

(Testimony of John V. Morris.)

that they were paid. It is very important to go into the entire background to see whether there was a willful violation [70] or whether it was one of those fortuitous things that arose from the various conflicts of interpretation. And here are a couple of cases which indicate the type of conflicts there were, and I could give you a half dozen more but I won't take the time.

All right. We will now take the recess.

(Short recess.)

The Court: All right, gentlemen. Let's continue with the testimony.

Mr. Mackay: You may cross examine, Mr. Wyshak.

Cross Examination

By Mr. Wyshak:

Q. At the time you were asked by the representatives of the French Sardine Company as to the propriety of their making a notation on each invoice regarding their charging an amount in excess of the ceiling, were you acquainted with the OPA rules and regulations?

A. I was acquainted with some of the OPA rules and regulations. I think at the time we took a service that was called Tax Research Service, or some darn thing that came out and told you what you could do and what you couldn't do, and what the Government had done on war production, OPA and taxes and no end of things. That came out every week, I think.

(Testimony of John V. Morris.)

Q. Did you make a study of it before giving them your conclusion? [71]

A. Well, no. I think the thing was all a gradual growth of trying to keep up with all the various things that happened, governmental and otherwise; and it was upon that knowledge that I had accumulated through various sources that I based my opinion—and I am as certain as I am sitting here that \$11 a case, regardless of how the darn thing got on record, was never the price ceiling of French Sardine Company. And I can explain and give you my substantial reasons which I believe are actual physical facts of comparison that haven't been gone into either by the management of French Sardine or the OPA; except all they did——

Mr. Wyshak: I think you have answered the question.

The Witness: ——all they did was substantiated Van Camp's \$11.

The Court: Don't get worked up, Mr. Morris, just talk calmly. Remember you are a witness and not an attorney.

The Witness: That is my defect, your Honor. I get lost. I can't help it. I apologize, your Honor.

The Court: All right.

Q. By Mr. Wyshak: But at that time the representatives of the French Sardine Company did feel \$11 was their ceiling?

The Court: Did what?

The Witness: Did feel that \$11 was their ceiling.

(Testimony of John V. Morris.)

Mr. Wyshak: Felt that \$11 was their ceiling price, didn't they? [72]

The Court: Did they feel that it was, or was that the price fixed? They didn't feel it was, because they contended it was more.

Go ahead. He is giving you a chance now to express an opinion. Go ahead.

Q. By Mr. Wyshak: Did they or didn't they?

A. Some did and some didn't. I didn't.

Q. But those who originated the idea of putting the notation on the invoices at the higher price did feel that \$11 was the ceiling?

The Court: What was the price of the invoices? I haven't seen the invoices since yesterday.

Mr. Wyshak: Your Honor, it was a dollar over what the \$11 was. It hasn't been put in evidence.

The Court: Go ahead. That is permissible.

Mr. Grady: Your Honor, I have a copy of the invoice that I would like to introduce in evidence now so your Honor could have the——

The Court: Wasn't one introduced yesterday?

Mr. Grady: There was merely a statement, your Honor.

The Court: Well, let's have it. I was under the impression that went in yesterday.

Mr. Grady: This is just one typical example.

The Court: All right.

The Witness: Do you want me to tell you why?

The Court: Answer the question, and then you may explain it.

The Clerk: Plaintiff's Exhibit No. 32 in evidence.

(Testimony of John V. Morris.)

(The document referred to, marked Plaintiff's Exhibit 32, was received in evidence.)

[See page 233.]

The Witness: I lost the darn thing. Can you repeat the question?

Q. By Mr. Wyshak: I think you stated that Mr. Williams was the one who originated this idea of putting the notation on the invoice, is that correct?

A. That was my impression as a result of one of those morning conferences.

Q. And he felt that \$11 a case was the ceiling price, did he not?

A. He was the one that came up with Van Camp's \$11.

Q. And if \$11 were the ceiling price, as a result of your study and analysis of the rules and regulations, you realized, did you not, that there would be a violation?

A. No. And I still contend there wasn't any violation.

Q. I say on the assumption that \$11 was the ceiling price.

A. That wasn't the ceiling price, in my opinion.

Q. On the assumption that \$11 was the ceiling price, billing it at \$12 with that notation on the invoice, would be a violation, would it not? [74]

A. If the ceiling price was \$11, actually, properly arrived at, in my opinion, they asked \$12, then I would say that would be a violation, yes.

The Court: This charge says:

(Testimony of John V. Morris.)

“Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1 per case less on 48/1½s and \$2 per case less on 48/1s, and will refund you accordingly.”

Now, under this it is conceivable that one of the buyers could have declined to do so by saying, “We’ll pay you the ceiling and then if you get the additional one and it makes it retroactive, we will pay you back.” And you would have accepted?

The Witness: That is right, we would. That was the intention. The intention was to give them their dollar back if somebody hollered too much from the Government.

Q. By Mr. Wyshak: French Sardine had to file with the OPA a schedule as to what its ceiling price was on each item, didn’t they?

A. I didn’t quite hear that.

Mr. Wyshak: Would you read the question, please?

(Question read.) [75]

The Witness: French Sardine Company did not have a ceiling price so Doc Williams tried to determine if he could correctly, with what Van Camp’s ceiling price was——

Mr. Wyshak: Would you please reread the question, Mr. Reporter? I don’t believe you caught the question, Mr. Morris.

(Testimony of John V. Morris.)

The Witness: I may not have.

(Question read.)

The Witness: I actually don't know. I didn't see what they filed.

Q. By Mr. Wyshak: Well, I asked, do you know whether they had to?

A. No, I don't know. I imagine they did, but I don't know. The regulations are so far off all I can have is the general impressions that I carry over from that time, plus the things that I might have been vehement on that didn't impress and inculcate themselves upon my mind.

Q. They would have filed such a schedule, wouldn't they, if they had to?

A. Well, the regulation will say so, and what the regulation provided, I presume was filed. We always try to abide by those regulations.

Q. If one were filed?

A. In the regular course of business that would have been the procedure.

Q. If one were filed? [76] A. Yes.

Q. Would it have had the \$11 figure or the one that you had in mind?

A. The one that they would have filed would have had their mistaken ceiling on, which is the \$11 ceiling; that being Doc Williams' idea that we were as big and comparable to Van Camp's.

Mr. Wyshak: No further questions, your Honor.

The Court: Any redirect?

Mr. Mackay: That's all.

The Court: That is all. Step down.

(Witness excused.)

Mr. Grady: Mr. John Tripps, please.

JOHN P. TRIPPS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: John P. Tripps, T-r-i-p-p-s.

Direct Examination

By Mr. Grady:

Q. Would you please state what your present office is with the Star-Kist Foods, Inc.?

A. Vice-president, secretary and treasurer.

Q. And that's formerly the French Sardine Company?

A. Formerly French Sardine of California.

Q. You also held those same offices with the French Sardine Company of California?

A. Yes.

Q. And for how long have you been treasurer of the French Sardine Company of California?

A. 20 years, plus.

Q. Are you also an officer of the High Seas Tuna Company?

A. I am. I am vice-president of High Seas.

Q. I hand you a schedule and ask if you can identify it?

A. This schedule is an analysis of our total sales of the period of May 1, 1942, through June 1947.

Q. Does it show other items?

(Testimony of John P. Tripps.)

A. It also shows the cash expenditures during the year 1942 by months, and average weekly and monthly turnover.

Q. Was this schedule prepared under your supervision? A. It was.

Q. From the books and records of the French Sardine Company? A. Yes, sir.

Mr. Grady: I offer this schedule in evidence, your Honor, as Plaintiff's Exhibit No. 33. A copy has already been furnished two or three days ago for counsel.

Mr. Wyshak: Your Honor, I am going to object to that on [78] the ground that no foundation has been laid as to who prepared it; and irrelevant and immaterial.

The Court: Well, I think before you allow a summary you have got to show how it was made. You have got to show whether it was made under his direction or whether in his opinion it correctly represents the sales as reflected in the original books.

Mr. Grady: Your Honor, may I inquire further then?

Q. By Mr. Grady: Mr. Tripps, who prepared that schedule under your direction?

A. Roy Kelly.

Q. Does it in your opinion correctly reflect the original books and records of the company; a summary of those books and records?

A. It definitely does.

The Court: All right. It may be received.

(Testimony of John P. Tripps.)

The Clerk: Plaintiff's Exhibit No. 33 in evidence.

(The document referred to, marked Plaintiff's Exhibit 33, was received in evidence.)

The Court: The original books are available to the Government if they want to check?

Mr. Mackay: Yes, indeed.

The Witness: Yes, sir.

The Court: All right.

Incidentally, these are the figures that were used in [79] computing the income tax in the report which is in as an exhibit?

The Witness: Yes, sir.

Q. By Mr. Grady: I hand you another document, Mr. Tripps, and ask you to identify that.

A. This is an analysis of sales and maximum ceiling prices covering tuna sold by the High Seas Tuna Packing Company from May 1942 through January 1943.

Q. And was that document prepared under your direction? A. Yes, sir, it was.

Q. And does it correctly reflect the books, in your opinion; correctly reflect the original books and records of that company? A. Yes, sir.

Mr. Grady: I now offer this document in evidence, your Honor.

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit No. 34 in evidence.

(Testimony of John P. Tripps.)

(The document referred to, marked Plaintiff's Exhibit 34, was received in evidence.)

The Court: The same is true as to the other? It is a correct summary, and the books are available, and it is the basis of the figures on which the income tax was computed as shown by a copy of the income tax return filed here? [80]

The Witness: That is correct, your Honor.

Q. By Mr. Grady: Mr. Tripps, I now hand you a document, a piece of cardboard with several documents on it, and I ask if you can identify that, please?

A. Yes. These are our usual bulletins that we mail to all of our brokers representing us.

Q. Would you state how many and the dates of the various mimeographs that are attached there so they will be properly identified?

A. August 20, 1942, two pages; September 24th, two pages; September 24th, another one; October 20th, 1942; December 1, 1942; January 4, 1943.

Q. Is that the original record from the files of your office?

A. Yes, sir, it is. We keep these in a large volume book.

Q. And can you tell the court the circulation that those mimeographs had—to whom are they sent?

A. Sent to our brokers, of which there are approximately 100 to 125 brokers.

Mr. Grady: I now offer this document in evidence. I don't know whether you would like to

(Testimony of John P. Tripps.)

have each separate mimeographed marked a separate exhibit number or——

The Court: Just circulars sent with the same subject. I think they can be put in as one exhibit. The reason I wanted [81] the others separately was because each record was different, and the ones that dealt with the same subject, they had an individual relationship.

Mr. Grady: Well, your Honor, these do each deal with a separate subject. One deals with mackerel and another one with sardines,——

The Court: I have no objection to that. If you have to pick one out, we can use a number for the subdivisions.

The Clerk: Is this admitted, your Honor?

Mr. Wyshak: Your Honor, I am going to object as to those portions that deal with fish other than tuna, and as to those that are dated subsequent to the time that——

The Court: Well, I think the court will disregard any matter in there except those that relate to tuna.

Mr. Wyshak: And also those memoranda which are dated after the date of the violation here.

The Court: Well, I would have to pick those out. I don't know which are dated after the violation.

Mr. Wyshak: Well, I don't know how to open this thing. I don't want to tear it apart.

Mr. Grady: Well, we didn't want to separate them, your Honor.

(Testimony of John P. Tripps.)

The Court: Well, I will disregard those after the date of the judgment.

Mr. Wyshak: No. I meant after the date of the sales [82] of tuna at the over-ceiling price, your Honor.

The Court: What is the last date?

Mr. Wyshak: I presume it would be the date the new regulation was promulgated early in January 1943.

Mr. Grady: We have no objection to your disregarding any after that, your Honor, because there are none after that date.

The Clerk: Is this admitted?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 35 in evidence.

(The document referred to, marked Plaintiff's Exhibit 35, was received in evidence.)

[See page 234.]

Q. By Mr. Grady: Mr. Tripps, have you examined the books and records of the French Sardine Company in an effort to determine what the ceiling price you had was on California sardines prior to August 31, 1942? A. Yes, sir, I have.

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: Overruled.

Mr. Grady: Your Honor, so that you might be able to follow this particular testimony, I refer you to Exhibit No. 18, which is price regulation 209, and in particular the fourth page thereof where

(Testimony of John P. Tripps.)

the new ceiling prices are listed. And I am going to ask the witness what the French Sardine [83] Company's price was on each of these items prior to the issuance of this new ceiling price.

The Court: All right.

Q. By Mr. Grady: Now, will you state your price on No. 1 ovals standard pack Tomato Sauce, mustard?

Mr. Wyshak: May I have a continuing objection, your Honor,——

The Court: Yes.

Mr. Wyshak: ——on the grounds that it is irrelevant and immaterial, and subject to a motion to strike?

The Court: All right. Overruled.

The Witness: You want that before the ceiling——

Q. By Mr. Grady: Before August 31, 1942, when this regulation came out.

A. \$4.10.

Q. Would you state what your price was on No. 1 ovals standard pack Natural? A. \$4.00.

Q. On No. 1 talls standard pack, Tomato Sauce, mustard? A. \$3.40.

Q. No. 1 talls standard pack Natural?

A. \$3.15.

Q. 8 oz. standard pack Tomato Sauce?

A. \$3.90.

Q. 8 oz. standard pack Natural? [84]

A. \$3.90.

Q. 5 oz. standard pack Tomato Sauce?

(Testimony of John P. Tripps.)

A. \$3.65.

Q. On 5 oz. standard pack Natural?

A. Also \$3.65.

Q. Now, have you computed what the average increase was in the prices fixed on August 31, 1942?

A. Yes, I have. It shows here from 12 per cent to as high as 35 per cent. Did you want it by specific items, or——

Q. Why don't you read the specific items in the order that I have given them to you?

Mr. Wyshak: May I inquire as to what the witness is testifying from?

Mr. Grady: You may.

Mr. Wyshak: What is that document?

The Witness: This is a memorandum that I made for my books.

Mr. Wyshak: You prepared it yourself?

The Witness: I have prepared most of it.

Mr. Wyshak: Which portions did you prepare?

The Witness: The prices, the calculations.

The Court: All right. Go ahead.

Q. By Mr. Grady: Would you state the percentage increase in the order that I have given you, starting with No. 1 oval pack Tomato Sauce mustard and ending with 5 oz. standard pack [85] natural?

A. 12.7; oval natural 13 per cent; talls tomato mustard 16.2; talls natural 14.3; 96 8 oz. tomato, 35 per cent; 96 8 oz. natural, 28.2; 100 5 oz. tomato, 27; 100 5 oz. natural, 20.5; or an average of 20.9 per cent.

(Testimony of John P. Tripps.)

Q. In some of those you indicated——

The Court: Is that the maximum allowed, or is that what you took?

The Witness: This is our ceiling price—the ceiling price allowed us over our March ceiling price.

The Court: I see.

The Witness: That was an increase.

Q. By Mr. Grady: You mentioned a figure—100 5 oz. I assume the 100 means how many cans in a case? A. That is right.

Q. And the same for 96 8 oz.?

A. Correct.

Q. Can you tell us from the books and records of your company what prices French Sardine paid for raw tuna per ton during the season 1941?

A. Yes, sir.

Mr. Wyshak: That is objected to as irrelevant and immaterial.

The Court: There we are getting into the question of reasonableness of the price, which is no concern of ours. [86] I think these discussions and negotiations, the things that were told the Administrator, the things they talked about, will show that there was a dispute, a reasonable basis and a reasonable basis for dispute. We can't go behind that, because otherwise we are going far afield.

Mr. Grady: I understand, your Honor, some statements were made in those letters determining these prices, and I merely wanted to verify them for your Honor, but——

The Court: I don't think we ought to, unless the

(Testimony of John P. Tripps.)

Government should dispute them by any testimony they offer.

Mr. Grady: All right.

The Court: If they do that, then you may go into the question of the correctness of the cost as referred to in the letters. You don't have to support the statement of your letters.

Mr. Grady: I have no further questions.

The Court: Any questions?

Mr. Wyshak: I have, your Honor.

Cross Examination

By Mr. Wyshak:

Q. With respect to the 97,215 cases of tuna that were sold in the period September 1942 to January 1943, can you give us a breakdown of approximately how many cases were sold each month in that period?

A. Yes, we can. I can't do it right offhand, now. [87] I am not prepared. It can be given to you.

Q. Well, would you say that most of it was sold immediately after it was decided to increase your price, with the notation on each invoice during September and October?

A. I think Roy can get some figures for me right there.

The Court: Who was that?

The Witness: Mr. Kelly is right here.

The Court: Well, that information is available. Are you going to put him on?

(Testimony of John P. Tripps.)

Mr. Grady: No, we didn't intend to, your Honor.

The Court: Well, if he has the facts available-- what is he, an accountant?

The Witness: He is the comptroller.

The Court: Well, if the information is available, I have no objection to putting him on and giving it to him when you are finished with this witness.

All right. Step down.

Mr. Grady: I have one further question from this witness.

The Court: Go ahead.

Redirect Examination

By Mr. Grady:

Q. Mr. Tripps, I notice from Exhibit No. 33 that the average weekly cash expenditures during the last three months, October through December, is substantially higher than the average weekly cash expenditures for the entire year. Can [88] you tell us why?

A. Yes, sir. That is our main season.

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: What was that? Read the question.

Mr. Grady: Your Honor, the average cash expenditures for the last three months of the year, which followed immediately our sending these invoices out, are substantially higher than the average for the entire year, and there is a significant reason for it.

(Testimony of John P. Tripps.)

The Court: I don't think it was necessary. I will sustain the objection.

All right. You want that information, Mr. Wyshak?

Mr. Wyshak: Yes, I would.

Mr. Grady: We will make him available, your Honor.

We have no further questions of this witness.

The Court: All right.

(Witness excused.)

Put your man on the stand.

Mr. Grady: We will make him available, your Honor. I don't know whether he has——

The Court: Oh, he is not here?

Mr. Grady: We can make him available, but it will take some computation.

The Court: Well then, we can do it at 2 o'clock.

Are you going to offer any testimony, Mr. Wyshak?

Mr. Wyshak: No oral testimony.

The Court: Have you got any documentary evidence?

Mr. Wyshak: Yes, your Honor. I think we should be finished today, your Honor; if that is what you had in mind.

The Court: All right. I will examine more thoroughly some of these exhibits which I have looked at, with the ones that have been introduced.

Mr. Grady: I might say, your Honor, that our next evidence will be two depositions which are on

file. Do you have any objection to the judge reading them during the noon recess, Mr. Wyshak?

Mr. Wyshak: I have some objection to the depositions, yes.

Mr. Grady: We would be willing to let your Honor read those.

The Court: Well, I may read them. However, I prefer, unless they are very long, that they be read into the record; especially if there are objections.

Are there any documents attached to the deposition?

Mr. Grady: Just two, your Honor.

The Court: Well, as long as there are objections, there is no use in reading them.

2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [90]

Mr. Grady: Your Honor, as Plaintiff's next exhibit I would like to introduce in evidence the claim for refund which was filed in this case with the Collector of Internal Revenue.

The Court: I thought a stipulation of facts admits that it was a timely demand for each, doesn't it?

Mr. Wyshak: I believe it does.

Mr. Grady: It does, your Honor, and I would just like to get the claim itself in evidence.

The Court: The only question isn't the form. The only question is whether it is timely and if the Government admits it was timely there is no ques-

tion left. However, if you want the form of it it is all right with me.

Mr. Grady: It is attached to the complaint and admitted in the answer. So I think that is probably sufficient. So I will withdraw the offer.

The Court: Accepted as an exhibit by reference.

Mr. Grady: All right, your Honor.

Your Honor, during the noon hour I think Mr. Tripps has had a chance to compute some of those figures Mr. Wyshak would like to have, and I offer Mr. Tripps—

The Court: All right. I might say that I have had an opportunity to go over more carefully the exhibits that were [91] introduced, and of course some of them are very lengthy, especially those relating to the various regulations; and, of course, in your argument you can call my attention specifically to the portions that you want to spare us.

JOHN P. TRIPPS

called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

By Mr. Wyshak:

Q. How many cases of tuna were sold during each month at those prices, above the ceiling price?

A. I did this hurriedly, Mr. Wyshak, and manually, without an adding machine and I arrive at—in September, 18,077 cases; October, 36,245; November, 14,803; December, 27,031 — 96,000-plus

(Testimony of John P. Tripps.)

cases. This was done, as I say, very hurriedly and manually.

Q. That was for September, October, November and December? A. Correct.

Mr. Wyshak: Thank you.

Redirect Examination

By Mr. Grady:

Q. Mr. Tripps, would you explain how some cases are shipped on consignment and some are sold from Terminal Island? Will you explain how that procedure works in your company? [92]

Mr. Wyshak: I think that is irrelevant and immaterial.

The Court: No, overruled.

The Witness: We ship on consignment for various reasons: one, accommodation of buyers, and storage facilities of our own. We ship to public warehouses, we leave it there in our name, our broker sells it, bills it on the buyer and sends us a copy of our invoice.

Q. By Mr. Grady: Well, by what period of time does the invoice which you receive from the broker follow the time that you tell him to go ahead and invoice?

A. Oh, it might be a week, 10 days, two weeks.

Mr. Grady: No further questions.

The Court: Let me ask you this question: The invoice I saw was made in your name?

The Witness: Yes, sir.

(Testimony of John P. Tripps.)

The Court: Does the broker send out that invoice in your behalf, or do you?

The Witness: That particular one happened to be made by us on a shipment made direct from Terminal Island.

The Court: Now, on those made by brokers, is the invoice sent in your name?

The Witness: Yes, sir, it is on our invoice head.

The Court: Then how do you know which broker—does the broker have a notation on it, or do you know who gets the commission? [93]

The Witness: His name is right on—the broker's name appears on that invoice.

The Court: That is what I wanted to know, because the practice may not be the same in all industries, you see.

The Witness: Correct.

The Court: As to what brokers actually do.

The Witness: This may be beside the point: However, all of our sales are made through brokers, whether we ship it direct or whether we ship it through consignment.

The Court: All right.

Mr. Grady: That is all.

The Court: You may be excused.

(Witness excused.)

Mr. Grady: Next, I would like to introduce a deposition taken on behalf of the plaintiff of Charles W. Triggs, who has been referred to here in the testimony. I don't know what your Honor's pleasure is, but if it is agreeable, I would like to

have Mr. Mackay take the stand, and I will ask the questions.

The Court: Yes. That is a good way of doing it. Many times, gentlemen, I agree to read depositions, but if they are too long, and especially if counsel reserve objections, we do that.

Mr. Grady: May we take the original from the file?

The Clerk: Deposition of whom? [94]

Mr. Grady: Charles W. Triggs taken on behalf of the plaintiff. I think there are two in there.

Your Honor, this one says that it is taken on behalf of the defendant. It may have both of them in there, I don't know. We intend to introduce both of them, anyway.

The Court: All right. Let us open it up and take it out, whatever you want.

Mr. Grady: Would you excuse me just a moment, your Honor? I will see if I can find out where the other one is.

The Clerk: If you check the clerk's office their documents will show the document.

Mr. Grady: We will read the one taken on behalf of the defendant first, the deposition of Charles W. Triggs.

The Court: All right.

Mr. Grady: "Deposition of Charles W. Triggs, taken on behalf of defendant, at 10:00 o'clock a.m., Thursday, August 5, 1954, at Room 728, 523 West Sixth Street, Los Angeles, California, before Arlene Jenkins, a Notary Public within and for the County

of Los Angeles, State of California, pursuant to stipulation and order to take deposition hereunto attached.

“Appearances: For the Plaintiff: Mackay, McGregor, Reynolds & Bennion, by A. Calder Mackay, Esq., and Stafford R. Grady, Esq., 523 West Sixth Street, Los Angeles 14, California, and [95] Roland G. Swaffield, Esq., Farmers & Merchants Bank Bldg., Long Beach, California. For the Defendant: Laughlin E. Waters, United States Attorney; by Robert H. Wyshak, Assistant United States Attorney.

CHARLES W. TRIGGS

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Wyshak:

Q. What is your name and address, please, sir?

A. Charles W. Triggs, T-r-i-g-g-s, 737 North Michigan Avenue, Chicago, Illinois.

Q. What is your present business or occupation?

A. I am the owner of Triggs Brokerage, fish and oyster—fish and seafood, rather, brokerage.

Q. During the years 1942 and '43, were you employed by the Government in Washington, D. C.?

A. I was employed as head of the Fish Section of Office of Price Administration.

Q. And how long were you employed in that capacity?

A. From February 10, 1942, until April 15, 1944.

Q. Did you have any title while so employed?

(Deposition of Charles W. Triggs.)

A. Chief of that division, Fish and Seafood Division.

Q. While you were in that capacity, did you have any conversation with the representatives of the French Sardine Company of California?

A. I did.

Q. And whom did you speak with?

A. Williams, Doc Williams. What were his initials?

Mr. Mackay: A. T. Williams.

The Witness: A. T. Williams, always known as Doc.

Q. By Mr. Wyshak: And do you know what his capacity was?

A. Sales manager of the French Sardine Company.

Q. Was anyone else present during this conversation? A. Not in Washington.

Q. And can you recall approximately when these conversations took place?

A. During the summer of 1942. Had a number of conversations when he was in Washington.

Q. In your office?

A. In my office in Washington.

Q. And what were these conversations with respect to? [97]

A. In respect to the price of tuna, canned tuna.

Q. Do you mean with particular reference to the French Sardine Company? A. Pardon?

Q. With particular reference to the French Sardine Company?

(Deposition of Charles W. Triggs.)

A. With particular reference to the French Sardine Company and the relative position between the French Sardine Company and other tuna packers.

Q. That was with respect to the ceiling price.

A. That was with respect to the ceiling price.

Q. Can you give us the content of those conversations?

A. It was in regard to the regulation that we were to get out covering the price of canned tuna. A regulation that we tried to get out in February of 1942 was not successful because the assistant to Henderson, the Administrator, refused to approve it. We then had to consider getting another regulation out, but owing to many regulations that we had to get out on canned fish and frozen and fresh fish there was considerable delay in getting out a new regulation, and the prices in force at the time were those that were stipulated by general maximum price regulation.

Q. Then, at that time there was no question as to what the ceiling price for canned tuna for the [98] French Sardine Company was?

A. The price was fixed by general maximum price regulation, which fixed the price at whatever price they had in March of 1942.

Q. What I mean is, there was no dispute as to what the ceiling price was at that time?

A. No dispute at that time.

Mr. Mackay: Let's clear that up. Of what time are you speaking?

(Deposition of Charles W. Triggs.)

Mr. Wyshak: When he had these conversations in the middle of 1942 with Mr. Williams.

The Witness: In the middle of 1942 there was some question. Of course, the regulation in force was general price maximum regulation until we got a new regulation.

Q. By Mr. Wyshak: In February 1943, was it?

A. That was in January of 1943.

Q. January?

A. That the new regulation came out.

Q. Well, what was the question with regard to their ceiling in the summer of 1942?

A. The question was about the position that the French Sardine Company was in with an \$11 ceiling while their competitors had higher ceiling prices.

Q. But there was no question as to the interpretation [99] of the regulations at that time, was there?

A. No question of the interpretation. It was the general maximum price regulation.

Q. Was there any discussion regarding the French Sardine Company raising its prices at that time?

A. During that summer Mr. Williams came to Washington. We discussed their situation and there was some talk about prices that they might be entitled to, and I think that at least four or five times Mr. Williams must have seen me before the regulation—the new regulation went into effect.

Q. Well, did you——

(Deposition of Charles W. Triggs.)

A. And—pardon me—he also telephoned numerous times from Terminal Island to see if we were going to get out the regulation.

Q. Did you advise him that it would be all right with you if they raised their prices over the \$11 ceiling at that time?

A. I discussed with him what we were doing on other canned fish, such as salmon, sardines, crab meat and shrimp, discussed that with him, and the way we had handled the ceilings on those items, canned salmon, for instance, would be based on the previous season pack plus a certain amount that would probably cover additional costs over the previous season. In other [100] words, we had to consider additional costs over and above what the previous year's price was.

Q. Well, during these discussions in 1942, did you at any time tell him that it was all right with you if the French Sardine Company raised its prices? A. Well—

Mr. Mackay: Just a moment. I object to that as a leading question.

Mr. Wyshak: The question has already been asked, Mr. Mackay.

Mr. Mackay: Well, whether it has or not, it is a leading question. If you want to ask him about the substance of the conversation, all right.

The Witness: Repeat the question.

Mr. Wyshak: Will you read the question, please?

Mr. Mackay: I will withdraw it to save time.

(Deposition of Charles W. Triggs.)

Mr. Wyshak: Will you please read the question?

(Question read.)

The Witness: I had no authority to tell anyone to raise their prices. I would discuss with him what they might be entitled to in the way of a price, but as for giving definite instructions, I am not in a position to do that.

Mr. Wyshak: Then, you didn't?

The Witness: Not definite instructions, no; no [101] definite instructions to raise prices.

Q. By Mr. Wyshak: Was there any discussion during these conversations regarding what you might do for the company if a complaint were brought against the company by the OPA for making charges over the ceiling prices?

A. Well, I can't say that there was.

Q. Well, can you say that there was not?

A. Any discussion about what I would do?

Q. Yes. Did you make a commitment to them?

A. Well, I might have made the statement that I would support anything that they might do if it was within reason. That would be logical for me to do. Inasmuch as we were allowing increased prices on other canned fish, I might possibly have made the statement they wouldn't be taking any chances or something of that kind.

Q. I didn't hear you.

A. That they might not be taking any great chances in raising the price because I was of the firm belief that they were in a bad position.

(Deposition of Charles W. Triggs.)

Q. Well, did you say that you would try to quash any complaint that might be brought against them?

A. I wouldn't say quash complaints, no. I [102] wouldn't say that.

Q. You mean you didn't say that?

A. I don't think I said that, no. In answer, I wouldn't be in a position to say that because the powers that be hired me to administer it, and I would say on that I might have been willing to recommend certain things.

Q. You do know, do you not, that charges were brought against the French Sardine Company for overceiling sales? A. Overceiling?

Q. Yes. A. Yes, I know.

Q. And you do know that the matter was settled on the basis of single damages——

A. Yes.

Q. ——being accepted?

A. Yes.

Q. Did the OPA at that time have any policy respecting accepting single damages?

A. The policy of the OPA was to accept single damages in certain cases. In very flagrant violations sometimes they would assess treble damages.

Q. Was there any policy about accepting single damages to avoid litigation? [103]

A. To what?

Q. Accepting single damages to avoid litigation.

A. Well, I think that was done as a matter of policy at times.

(Deposition of Charles W. Triggs.)

Q. Would you say it was done in this case?

A. Well, it might be in this case.

Q. Well, do you know if it was in this case?

A. I don't know.

Q. You don't know?

A. No. I might—I knew what happened afterward, that the enforcement man in Washington, a man named Greenberg, showed me a check—showed me the check which was given and wanted to know if I thought they ought to send it back for treble. I told him at that time—I explained the nature of the whole case and told him if I had my way I would send the check back and let him keep it.

Mr. Wyshak: For the record, would you put in my statement that Mr. Triggs' last statement should be stricken as not responsive to any question.

Mr. Mackay: May I ask the witness at this time: When you say you told him to send it back to the French Sardine Company?

The Witness: Send it back to the French Sardine Company, yes. [104]

Q. By Mr. Wyshak: Prior to the issuance of the new regulation in January of 1943, was there anything in the OPA regulations to justify an unauthorized increase in the price of canned fish with a notation on the invoice to the purchaser that the overcharge would be refunded if it were not subsequently approved?

Mr. Mackay: You are asking him a legal question. Regulations could vary.

(Deposition of Charles W. Triggs.)

Mr. Wyshak: Well, perhaps the witness knows the answer.

Mr. Mackay: Well, we object to it, calling for a conclusion of the witness."

The Court: Unless you tell me you are insisting on the objection, I don't know whether you want me to pass on it or not.

Mr. Grady: We don't insist on it, your Honor.

The Court: Go on.

Mr. Grady: (Reading)

"The Witness: Well, I couldn't say if there was any——

Mr. Mackay: Not the best evidence."

Mr. Grady: I waive that objection, too, your Honor.

"The Witness: ——provision for an instance of that occasion, putting on the invoice. I couldn't say as to that. [105]

Q. By Mr. Wyshak: You don't know of any?

A. I couldn't say. It might have been done in some divisions of OPA.

Q. But on canned fish it wasn't done?

A. Not to my knowledge, no.

Mr. Wyshak: That is all.

Cross Examination

By Mr. Mackay:

Q. Now, Mr. Triggs, you have been asked about general maximum price regulation. I think that came out in April of 1942, didn't it?

A. '42, yes; April '42.

(Deposition of Charles W. Triggs.)

Q. What did that do with respect to establishing ceilings for the individual canners of fish?

A. It fixed the prices at their selling prices in March of that year.

Q. In March of 1942?

A. Yes, March of '42.

Q. Were you then made acquainted with the price ceiling problems on fancy tuna which confronted the French Sardine Company during 1942 and '43?

A. I was.

Q. And do you remember what the ceiling price was based upon their March 1942 prices?

A. The ceiling price we finally—— [106]

Q. No, no. The price finally based on their March 1942——

A. Well, the ceiling price on French Sardine was \$11.

Q. How did that compare with other competitors in that area?"

Mr. Wyshak: Your Honor, I will object to that as calling for a conclusion of the witness, and not proper cross examination.

The Court: Overruled.

"Mr. Mackay: Well, you have asked about certain conversations here and——"

Mr. Grady: Oh, this is colloquy on the objection. If it has been ruled upon, I will omit it.

The Court: All right.

Mr. Grady: The question was then read, your Honor, and the witness answered it on page 12,

(Deposition of Charles W. Triggs.)

line 12. So to re-orient the witness I will ask the question again.

“Q. How did that compare with other competitors in that area?

The Witness: It was very low.

Q. By Mr. Mackay: You said that Mr. Williams had visited Washington several times during the summer of 1942 and that he had often telephoned to you. He had written to you also, I suppose? [107] A. He had, yes.

Q. And what was the purpose of his coming to you and having these conversations about which you have been asked by counsel?

A. To ascertain how soon we could get a regulation into effect that would permit them to increase their selling price.

Q. Now, with such a low ceiling price of \$11 a case that French Sardine had under general maximum price regulation, how did that affect them with respect to their competitors, particularly with respect to purchasing raw fish?”

Mr. Wyshak: Your Honor, I object to that on the grounds that it is hearsay and also is calling for a conclusion of the witness.

The Court: I assume that was rather speculative. The objection is sustained.

Mr. Grady: I will skip the answer then, your Honor, and proceed with the next question, which begins at line 13, page 13.

“Q. By Mr. Mackay: Well, in your opinion,

(Deposition of Charles W. Triggs.)

would that put them at a great disadvantage because of that?"

Mr. Wyshak: I object to that——

The Court: That goes with the other one. The objection is sustained. [108]

Mr. Grady: I think the next two or three follow the same line.

The Court: Then it will be understood they all fall in the same category. Go to the next starting point.

Mr. Grady: Beginning at line 25 on page 13:

"Q. By Mr. Mackay: Now, Mr. Triggs, as a result of your conversations with Mr. A. T. Williams, who was sales manager of French Sardine Company, did you look into their situation for the purpose of determining whether the ceiling prices of the French Sardine based upon their prices in March 1942 as required by general maximum price regulation were too low?

A. I was quite familiar with what was happening in the situation of this kind. The demand was so great that there was a tendency to bid prices up. In fact, I know that there was very sharp competition in buying of tuna from the boats."

Mr. Wyshak: I move to strike that, your Honor, as not responsive to the question. It is irrelevant.

The Court: Well, I think it is responsive all right. But I think the last paragraph may be stricken, about the competition. I think the first part may remain.

Mr. Grady: "Q. Was it your opinion after talk-

(Deposition of Charles W. Triggs.)

ing with Mr. Williams and investigating their ceiling [109] prices that their ceiling prices were too low and some relief should be given to them?"

Mr. Wyshak: I object to that, your Honor, as irrelevant and incompetent.

The Court: Oh, no, it certainly isn't. When you fix the price by formula, but a price of a certain date, then it is a question of whether the price was correctly fixed as of that date is material.

Mr. Wyshak: But he isn't answering that, your Honor.

The Court: He says in his opinion—he was asked if it was too low considering all the other elements. He is supposed to know. He is the man in charge.

Mr. Wyshak: He has testified as to what their ceiling price was—\$11 a case; and that that was the ceiling price.

The Court: Well, if it was too low, then the OPA had no right to fix it at that price. He has a right to be discussing it.

Mr. Wyshak: Well, I think what the witness means was their ceiling price was low compared to their competitors; speaking absolutely——

The Court: Well, you can argue that but I don't want to argue. Let us go on and get the evidence in.

(Whereupon Mr. Grady and Mr. Mackay continued to read the deposition.)

"A. I was certainly of that opinion. [110]

Q. And did you have that opinion in the summer of 1942? A. In the summer of 1942.

(Deposition of Charles W. Triggs.)

Q. Yes. Did you so state to Mr. Williams? Did you advise Mr. Williams that the prices were too low or did you agree with Mr. Williams that their ceiling prices were too low?"

Mr. Wyshak: I object to that as a leading question.

The Court: No. That is overruled. This is cross examination. He is cross examining your witness. Overruled.

Mr. Mackay: (Reading)

"A. I didn't advise him. I agreed with him that the prices were too low.

Q. That's what I mean. Having determined in the summer of 1942 that the ceiling prices of French Sardine Company with respect to canned tuna were too low, what steps did you take or were taken by the OPA to alleviate that situation?

A. No steps were taken that would alleviate that. That is, nothing was done until the new regulation came out. Consideration was given to the situation through the summer and fall of 1942, but owing to the amount of work that we had getting out other regulations, amendments and so forth, we did not have the staff to get out a tuna regulation until—the [111] record shows—January 13th; but it was well known through the latter part of the summer of 1942, not only by myself but by members of the staff, that we had to have a higher level of prices which in addition—outside of tuna would apply to other commodities as well, such as I stated before on salmon.

(Deposition of Charles W. Triggs.)

Q. Did you have any conversation either in person or by telephone with Mr. Williams in the summer or late summer of 1942 to the effect that he advised you that the company had shipped some tuna but not billed it?

A. I had some conversation with him, but he had written regarding that. That I think is a matter of record in writing where he stated what they intended to do and notified me to that effect.

Q. Yes. Do you recall whether or not Mr. Williams advised you because of the delay in getting out the new regulation which would give them some relief that it would become necessary for them to invoice some of the shipments that had been made at the price of \$12 and that they would refund to the customers \$1.00 in the event that the new regulation did not come out by October 31st?

A. He advised me to that effect. [112]

Q. Do you recall about when that was, Mr. Triggs?

A. He wrote me some time in the month of September that they were going to invoice at \$12 and that in the event the regulation was not issued by October 31st that they would refund the \$1.00 per case that they were charging over the regular level of the price.

Q. Now, I will ask you if a regulation was issued by the OPA subsequently fixing the ceiling price of tuna for French Sardine at \$12 a case?"

Mr. Wyshak: I object to that, your Honor, as irrelevant and immaterial.

(Deposition of Charles W. Triggs.)

The Court: All right. Overruled. This entire thing is very material.

Mr. Mackay: (Reading)

"A. \$12, yes.

Q. Do you recall when that regulation was issued? A. When?

Q. Yes.

A. I think it was January 13, 1953.

Q. '43, you mean?

A. I mean '43, yes.

Q. Now, in your direct examination you stated, I think, that you were shown a check by Mr. Greenberg [113] of the French Sardine Company. I will ask you about when that was shown to you. Do you recall?

A. It was I think some time during the month of June, about the middle or latter part of June 1943.

Q. 1943. I show you a check and I will ask you if that is the check that you were shown by Mr. Greenberg.

A. I think it is. That is the amount.

Mr. Mackay: That is the amount? And it is made out to the Treasurer of the United States. I would like to have this marked for identification."

Mr. Grady: Your Honor, the document was marked for identification, and the shorthand reporter's signature and markings are on it. I think Mr. Wyshak has seen the check. And I now offer the check in evidence.

The Court: It may be received.

(Deposition of Charles W. Triggs.)

The Clerk: Plaintiff's Exhibit 36 in evidence.

(The document referred to, marked Plaintiff's Exhibit 36, was received in evidence.)

"Q. By Mr. Mackay: Mr. Triggs, when you were shown this check by Mr. Greenberg—first, let me ask you who Mr. Greenberg was at that time.

A. He was in charge of the enforcement of Food Division of the OPA.

Q. Of the OPA? [114] A. Yes.

Mr. Wyshak: In Los Angeles?

The Witness: In Washington.

Q. By Mr. Mackay: In Washington?

A. Yes.

Q. And will you please state again what you said when you were shown that check?

A. I told—I explained the circumstances of how that was received by the government, by OPA in Los Angeles, and told him that, knowing what I did, if I had my way I would return the check to the French Sardine Company or Los Angeles and have it returned to the French Sardine Company, and that was in response to a question he asked me if I thought they should return the check to the Los Angeles Regional Office for treble.

Q. For treble damages? A. Pardon?

Q. For treble damages?

A. Treble damages."

Mr. Grady: Mr. Wyshak, you interposed an objection at that time. Do you wish to state it now?

Mr. Wyshak: No.

The Court: All right.

(Deposition of Charles W. Triggs.)

Mr. Grady: (Reading) [115]

"Q. And you made that statement in June of 1943? A. June 1943.

Q. Let me ask you this: If that statement you then made to Mr. Greenberg was based upon your conviction at that time as Chief of the Fish Section that there had been no violation or intention of violation of the law or regulations by the French Sardine Company?"

Mr. Wyshak: I will object to that, your Honor, as irrelevant what the OPA thought about it.

The Court: Overruled. Go ahead.

"The Witness: I based that on the knowledge that I had received and knowing that the French Sardine Company had tried to go along with OPA and not violate and knowing what the price of tuna—price of other canners. I had no hesitancy in stating that French Sardine Company should not be prosecuted for violation because what they did was really open and above board.

Q. By Mr. Mackay: In your dealings with the French Sardine Company during 1942 did you find anything in connection with this ceiling price, any act on their part which would indicate that they did not want to come along and not co-operate with the Price Administration Office?

A. Not at all. [116]

The fact that they communicated with me repeatedly, called me on the phone, and Mr. Williams visited me in Washington, my office there, the Office of Price Administration, at different times,

(Deposition of Charles W. Triggs.)

assured me that there was no effort being made on their part to violate. I was conversant with what was going on.

Q. Well, now, Mr. Triggs, can you give the substance of the discussion with Mr. Williams relative to the raise in French Sardine's price of tuna?

A. You mean before the regulation——

Q. Yes, the summer of 1942.

A. Well——

Mr. Wyshak: Which conversation do you mean?

Mr. Mackay: Well, the one he had in the summer of 1942 that you asked him about.

Mr. Wyshak: Well, he had several of them.

Mr. Mackay: Well, you did not identify them.

Q. Can you identify them? I will say the discussion you had in July or August 1942.

A. In August 1942 we discussed what was doing on other canned fish, and I am quite sure I left the impression with him that they would be entitled to an increase in price because I felt sure we were going to establish a higher price—in fact, I knew we were—establish a higher price than \$11; and even if it was [117] based on the average of the various canners it would be not only \$12 but I think higher than \$12. So that was the reason why I would have discussed with him the possibilities of an increase in price.

Mr. Wyshak: This was only if the new regulation was put into effect?

The Witness: Pardon?

(Deposition of Charles W. Triggs.)

Mr. Wyshak: Only if the new regulation was put into effect?

The Witness: If a new regulation was put in effect, yes.

Q. By Mr. Mackay: Was discussion had there with respect to shrimp or salmon?

A. Pardon?

Q. Did you have any discussion at that time with respect to shrimp or salmon?"

Mr. Wyshak: I object to that as immaterial and irrelevant.

The Court: Overruled.

"The Witness: Yes, I discussed other canned fish as well.

Q. By Mr. Mackay: Well, did that have any relation to the contemplated increase in the price of sardines?"

Mr. Wyshak: Same objection. [118]

The Court: Overruled.

"A. It would have some relation because we were establishing a policy of allowing an increase in price to cover increase in costs from the previous season.

Mr. Wyshak: Under regulations?

The Witness: In the regulation we were allowing—yes, in the regulation we were putting into effect during the summer of 1942 allowance was made for increased costs.

Q. By Mr. Mackay: Now, I think you stated a while ago that the ceiling price of French Sardine of \$11 we talked about was lower than the com-

(Deposition of Charles W. Triggs.)

petitors'. Do you know how much lower? What was the competitors' price approximately?"

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: Overruled.

"The Witness: I know the price was as high as \$13.75, and I think that information could very readily be secured from the various canneries and I think if you would secure that you would get actual figures as to what ceilings were.

Q. By Mr. Mackay: Mr. Triggs, was the delay in getting out a new price ceiling regulation caused in [119] any respect by your unwillingness to set a higher ceiling price on French Sardine tuna?

A. Not at all. The delay was entirely caused by the amount of work we had to do in getting out various regulations, not only canned fish but frozen fish and fresh fish. We had an immense amount of work, a limited staff, and it takes quite a long time to gather—it did take quite a time to gather the necessary information that would warrant our establishing the regulation."

Mr. Grady: Do you want to state your own objections, Mr. Wyshak?

Mr. Wyshak: I waive it.

The Court: Go ahead.

"Q. By Mr. Mackay: Well, under those circumstances is it fair to deduce from your testimony that the industry was reasonable in its expectation that a higher price would be fixed?"

Mr. Wyshak: Objected to, your Honor, as call-

(Deposition of Charles W. Triggs.)

ing for a conclusion of the witness; irrelevant and immaterial.

The Court: Overruled.

“The Witness: I think that would depend largely upon the members of the industry. A canner who was fortunate to have a high ceiling price under general max would not be so anxious I think to see the [120] regulation of a canner who had a low ceiling price.

Q. By Mr. Mackay: Now, you stated that the French Sardine had advised you that it was going to sell its tuna and bill the customers at \$12 and refund it if the regulation did not come out. Were you also furnished a copy of the notice to the brokers and others who might have been interested in it? A. I was.

Q. I show you what appears to be a mimeographed letter dated September 24, 1942, addressed To Whom It May Concern, on the French Sardine Company letterhead and signed by the French Sardine Company, Inc., and I will ask you if you will please read that and then tell us whether or not you received a copy of that from the French Sardine Company in 1942.”

Mr. Wyshak: Your Honor, I object to that as not within the scope of proper cross examination.

The Court: Overruled.

“The Witness: Yes, we received a copy of that letter.

Mr. Mackay: I would like to have this marked for identification.”

(Deposition of Charles W. Triggs.)

The Court: Is that a different letter from the letter you have now?

Mr. Grady: Your Honor, we put the original in the [121] record this morning as one of the several documents—

The Court: We don't need it except to show he knew of the contents.

Mr. Grady: That's right.

The Court: You don't need to put it in.

Mr. Grady: It is a mimeograph dated September 24, 1942; one of the several attached to Exhibit 35.

The Court: All right.

“Mr. Mackay: That is all on cross examination.

I would like to take a recess for about three minutes if it is all right with you.

Mr. Wyshak: I just want to ask about three questions.

Mr. Mackay: Oh, I beg your pardon.

Redirect Examination

By Mr. Wyshak:

Q. Mr. Mackay asked you questions about the French Sardine Company's prices being too low in the summer of 1942, and you agreed that they were too low. You do not mean to imply by that, do you, that their prices were lower than allowable under the existing OPA regulations at that time?

A. No, not lower than.

Q. They were as high as they could be, were they not? [122]

A. It was higher.

Q. As high as it could be under the regulations?

(Deposition of Charles W. Triggs.)

A. According to the general max, which fixed the prices at March 1942.

Q. When Mr. Williams told you that they had that notation on the invoice that is described in the mimeographed letter which you were shown by Mr. Mackay, did you make any comment to Mr. Williams about the invoices as they were going out?

A. You mean as to whether I agreed to it?

Q. Whether you would okay it or authorize it?

A. No, I was not in position to okay it or authorize it.

Q. Well, did you say that it was all right by you?

A. I might have expressed myself as being agreeable to it, but as far as giving authority, I was not in a position to do that.

Q. Well, the ceiling price for the French Sardine Company for this tuna at that time was \$11 per case, was it not?

A. As long as general max was in effect, the legal price was \$11.

Q. \$11 a case? A. Yes. [123]

Q. And French Sardine knew it was \$11 a case, did they not? A. Oh, yes.

Q. That anything charged over \$11 a case would be a violation of the regulation?

Mr. Mackay: I object to that as calling for a conclusion."

The Court: Overruled.

"Mr. Wyshak: Would you answer?

Mr. Swaffield: Well, just a moment.

(Deposition of Charles W. Triggs.)

The Witness: Well——

Mr. Swaffield: Just a moment. Would you define the word 'violation' as you use it?

Mr. Wyshak: Well, perhaps the witness understands me.

Mr. Mackay: I object to that. After all, the law says 'intentionally violate.' You don't mean to tell me that a company that has done as these people have done there would have any intention to violate the law?

Mr. Wyshak: Well, I think it was clear it was a violation and they charged in excess of \$11.

Mr. Mackay: That is exactly what we say, there was not a violation of the law.

Mr. Wyshak: Well, Mr. Triggs knew the regulation [124] at that time.

Q. Would it be a violation?

A. A violation of the general max, yes.

Q. It would be a violation of the general maximum regulation?

A. Yes.

Q. Was there anything in the regulations about shipping merchandise and not billing it, not billing for it in the ordinary course of business? In other words, delaying billing for it?

A. Not to my knowledge.

Mr. Wyshak: That is all.

Recross Examination

By Mr. Mackay:

Q. Well, now, Mr. Triggs, when you stated that

(Deposition of Charles W. Triggs.)

any prices charged in excess of \$11 would be a violation, do you mean to imply that there would be a willful violation or just a technical violation?"

Mr. Wyshak: I object as immaterial.

The Court: Overruled.

"A. I would say it was a technical violation. I couldn't say it was a willful violation. It might be a technical violation.

Q. Well, was there anything done by——

A. There was nothing in my experience in the [125] office there——

Mr. Wyshak: I move to strike that as not responsive.

Mr. Mackay: If you don't let him finish, you don't know what you are striking.

The Witness: ——to indicate that it was willful. Because of the mere fact that he took things up with me repeatedly to find out when we were getting out a regulation I think is evidence of the fact that it wasn't anything willful. It might be technical but I don't think you could say that it would be willful."

Mr. Wyshak: I move to strike it, your Honor, as calling for a conclusion of the witness.

The Court: Motion denied.

"Redirect Examination

By Mr. Wyshak:

Q. Well, he knew that the ceiling price was \$11——

(Deposition of Charles W. Triggs.)

Mr. Mackay: We will admit that they did.

Q. By Mr. Wyshak: ——and he knew that if he charged anything in excess of that it was not in accordance with the regulations? A. Yes.

Q. And he knew what he was doing?

Mr. Mackay: Wait a minute. I object to that as [126] improper direct examination.

Q. By Mr. Wyshak: The French Sardine Company knew what it was doing? A. Yes.

Mr. Mackay: We will admit for the record that the French Sardine Company knew that the price was \$11. We further admit that we went back there and put forth every effort we had to comply with the regulations and the law; but we deny that there was any intentional violation or any violation of the law or the Act.

Mr. Wyshak: That is all."

The Court: All right.

Mr. Grady: Your Honor, I am at a loss to understand why the original deposition taken on behalf of the plaintiffs was not filed.

The Court: Whose deposition was that?

Mr. Grady: This was the deposition taken on behalf of the defendant which we just read.

The Court: Whose deposition did you take?

Mr. Grady: We took the deposition of the same man on behalf of the plaintiff.

The Court: What difference does it make?

Mr. Grady: Well, I think it would be cumulative.

The Court: The presumption is he testified the same [127] way on each occasion. I don't know why it wasn't here. We don't have it. Where did you take it?

Mr. Grady: It was taken at the same time and same place, and we have attempted to contact the reporter who took them, who apparently forgot to file it. And we find that she is in Judge Tolin's court and will not be free until 3:15.

The Court: You can send her a message to be asked to be handed to her by the clerk. If you are finished we can have a short recess while you go over and send a message to the clerk and ask for—who was it, Virginia Pickering?

Mr. Grady: Yes. Well, Arlene Jenkins, one of her girls, did it.

Your Honor, may I suggest this: We have a copy of it, and we are perfectly willing to introduce the copy in evidence, if that would be agreeable with you.

The Court: Is there any disparity? What is the idea of incumbering the record. You have a terrific record as it is. What is the idea of incumbering the record with two versions of the deposition of the same person.

Mr. Grady: May I have a moment to discuss it with Mr. Mackay?

The Court: Unless there is something else where the witness has contradicted himself in one or the other.

Mr. Wyshak: They are substantially the same, your Honor.

The Court: You know, it is like an examination under [128] 43(b). If it is in the record you can base a finding on it. I have always held when a man is examined under 43(b) or under the 2055 Code of Civil Procedure, the evidence is in the record and you can't put him on again and go over the same ground. Lawyers in Superior Court said, "Well, I want to examine him on my own terms." What difference does that make. He is supposed to tell the truth either way. If you want to amplify, yes. So I don't know. I can't see where the advantage would be of having two depositions of the same person.

Mr. Mackay: There is only one thought I have, and if I could have just a short recess. There may have been some things in our deposition which we were unable to take on cross.

The Court: Well, we will take a short recess.

(Short recess taken.)

Mr. Grady: Your Honor, we have gone over the deposition taken on behalf of the plaintiff and find it to be in substance merely cumulative of the one which was taken on behalf of the defendant and already introduced, and we think it would only take the time of the court unduly to read the same thing over again. And we will therefore not do so, and rest our case.

The Court: All right. Mr. Wyshak?

Mr. Wyshak: I would at this time like to renew my [129] motion to strike all evidence having to do with what the ceiling price was at this pertinent time, with all evidence with respect to whether this

was or was not a violation of the OPA laws. And I base this motion on the ground, first of all, I feel that the plaintiff is precluded from going into it, based on a doctrine of waiver or estoppel, or adoption of administrative remedies, or whatever you want to call it; and that the only issue for this court's determination is as to the intent of the plaintiff when it did these acts. So that any evidence in that regard is irrelevant and immaterial to a determination by this court.

The Court: Well, the motion will be denied. And now that I am familiarizing myself with the case, I want to say that the Government in its memorandum has entirely misconceived the nature of this action. This is not an action seeking to relitigate in the Federal Courts before this court a matter which had been previously litigated in an action against the OPA to recover money which had been paid as a fine. All the cases the Government cites are to that effect.

This case comes clearly within the two cases decided by the Ninth Circuit, and you can't understand the second one which you cited in your brief without reading the first one, because the second one was on a finding of fact by the tax court which found upon sufficient evidence that the violation was an innocent one. You have to go back to the [130] first case, and that is *National Brass Works against Commissioner of Internal Revenue*, in order to find what the court decided.

In that case, the court was considering whether in that case the *National Brass Works* brought an

action to review a decision of the tax court finding that a determination deficiency of the Commissioner of Corporations was correct. The Commissioner was contending that a recovery by the Office of Price Administration in an action determined that a violation was willful. The court disagreed. The court analyzed the OPA statute under which the recovery is to be had and held that the recovery was not penal and the Tax Court had erred in so holding, and sent it back for the purpose of determining whether under the facts violation was fortuitous and whether, therefore, the violation had been innocently and unintentionally made, or not made through an unreasonable lack of care. The case was sent back to the Tax Court to make the finding.

Now, later on the Tax Court made such a finding, and the case, when it went up the second time, 205 Fed. 2d 104, the Circuit Court, under the statute, held that the finding was not clearly erroneous, there was substantial evidence to sustain it, and sustained it.

So all this testimony is material to determine whether the violation of the overcharge, for which recovery was had, [131] had been innocently and unintentionally made and not made through an unreasonable lack of care. And the letters which I have read, the discussions with the officials, the admissions of the officials themselves certainly bear upon that question, because if I had sustained your contention then there would be no evidence at all. You have objected to every bit of testimony, except the names of the witnesses, that has been intro-

duced, evidently on the misapprehension, as the first part of the brief indicates, that they are trying to relitigate whether they are seeking to recover from the Government this amount. They are not seeking to recover from the Government an amount they have paid, so your argument that they should have exhausted their administrative remedies is entirely beside the point. They are not seeking to recover from the Government in this lawsuit—what they are seeking, they sought a deduction just as though they had been sued and they defended a lawsuit and paid out attorneys' fees, and they come into court and your department had declined to allow that as an expense and they had sought the allowance of the expense. That doesn't mean getting back from the Government the amount, but getting back from the Government the amount of surplus taxes which resulted from the failure of the Government to allow that.

So, that is what we are dealing with here. This isn't a suit to recover an amount paid by failure to exhaust [132] administrative remedy. You are even wrong in your failure to exhaust administrative remedy. That recovery was not an administrative settlement. It was a court settlement. They failed to appeal from the judgment because it was a consent judgment. So your entire first part of the brief has absolutely nothing to do with the case, based upon an entire misconception of the nature of this lawsuit.

The motion will be denied.

Have you any evidence you desire to offer, or do

you rely on the showing made or whatever contrary inferences may be drawn?

Mr. Wyshak: I had just intended to read one page from this other deposition, your Honor.

The Court: All right.

Mr. Wyshak: This is the deposition taken by the plaintiff of Charles W. Triggs at the same time and place that the other deposition was taken.

Mr. Grady: What is the page?

Mr. Wyshak: No. 23. The question is by myself to Mr. Triggs.

"Q. At the time of your conversations with Mr. Williams regarding the new regulation on king salmon, did you tell Mr. Williams that it would be all right for the French Sardine Company to raise its prices by a proportionate increase? [133]

"A. No, I had no authority to do that.

"Q. Well, did you tell him that?

"A. I did not.

"Q. At the time the French Sardine Company was sending out tuna at \$12 a case when the ceiling price was \$11 a case, there was no question about the ceiling price being \$11 a case, was there?

"A. No.

"Q. French Sardine Company knew that the ceiling price was \$11 a case at that time?

"A. According to General Max.

"Q. Well, was there any other regulation in effect which would affect the ceiling price?

"A. None."

Mr. Wyshak: That is all, your Honor.

The Court: All right.

I will hear any argument you desire to present, gentlemen.

(Whereupon closing argument was presented by plaintiff and defendant.)

The Court: Gentlemen, I think that in this case we must bear in mind this fact: Under the old statute as it existed prior to 1948 the Tax Court was made the final arbiter of the determinations of fact. The language was held by some court to be stronger than the Federal Rules; by others weaker than the Federal Rules. And there are cases which [134] say upon the facts and the law there is a mixed question of fact and the law, that the reviewing court was subject to its own judgment.

In 1948 the Internal Revenue Code was amended and the section relating to the review by the Federal Courts was made to conform to the Federal Rules of Civil Procedure; and that is to Rule 52, which says, "Findings of a court shall be sustained unless they are clearly erroneous."

The new section—I can't think of the name of it—so holds. In fact, there is an opinion which I wrote for the Court of Appeals in the case of *Stockton vs. Commissioner of Internal Revenue*. It is out in the tax services, but isn't out in the advance sheets, yet. Of the eight opinions that I wrote this time on the Court of Appeals, four were on tax matters. Only one is out. But in *Stockton Hardware Company against the Commissioner of Internal Revenue* we were called upon to determine the effect of this amendment, because the court had determined in that particular case that property

was held in the ordinary course of business for sale in the ordinary course of business, and there was a very strong argument made that that conclusion was a mixed conclusion of fact and law, and we ought to apply the old rule. I wrote the opinion. And I pointed to the fact that whether you apply the old criterion or the present criterion, that is a question of fact and that therefore the opinion, being [135] sustained by ample evidence, cannot be disturbed. One of my associates dissented, but not on that point. He dissented upon a legal point. He agreed as to that point the court could have found one way or the other, and we could not disturb it.

I am making this observation because you can be misled by trying to apply the second National Brass Works, or the language used in National Brass Works to this situation. The court in National Brass Works was doing what we were doing in the Stockton Hardware case, that is, reviewing a ruling upon conflicting evidence. If the opinion had been the other way, the ruling would have been the same. So that the language you referred to doesn't help us at all.

The gist of the opinion lies in this: Now let us see how Judge Stephens interprets his own opinion in the prior case, and then let us go back to the prior case and forget this one, because nothing except the interpretation matters.

This is the way he interprets his own opinion:

"In the opinion filed by this court remanding the case for further proceedings, we said that a

payment to be held as an ordinary and necessary business expense must 'not frustrate the purposes of a statute or violate public policy,' must not be a 'fine in a criminal case', and must not be 'forfeiture in a case where it has been proven [136] that the forfeited article has been knowingly or carelessly permitted to be used for or toward an illegal purpose.' We held that petitioner's payment was not a fine or forfeiture within the above definitions. And, since the law violated was 'highly complex and difficult to comprehend', an expenditure incurred because of a proved violation of the Price Control Act, 50 U.S.C.A. Appendix, 901 et. seq., was not automatically precluded as a valid income tax deduction. Accordingly, the Tax Court was directed to allow the claim if, upon taking evidence, it determined that the overcharges had been 'innocently and unintentionally made and not made through an unreasonable lack of care.' "

That's the way Judge Stephens interpreted his own opinion. And if you read the portion of the opinion which he summarized here you have it in greater detail, so I am going to read it to you because this says specifically the fact that they violated it and paid for the violation does not preclude them from showing that it was an innocent violation. That is a violation where there was hope and expectation that the feeling would be changed and negotiations in that direction.

Let us read the paragraph which he paraphrased here. Now, we are going back and reading from 182 Fed. 2d 526 at [137] page 530.

“Study convinces us that, in these circumstances, an expense is ordinary and necessary if commonly experienced in the community, provided that the expenditure does not frustrate the purposes of a statute or violate public policy. And expense is not ordinary and necessary when it is a fine in a criminal case or a forfeiture in a case where it has been proven that the forfeited article has been knowingly or carelessly permitted to be used for or toward an illegal purpose. But this is not saying that the payment made to the Government was not ordinary and necessary solely because a law had been violated. Where, because of its nature, the law has been violated without intent or without carelessness tantamount to intent, violation of itself is not decisive of the problem.

“Here there was no fine or forfeiture under the above definitions of those terms. The law violated was highly complex and difficult to comprehend and therefore innocent violations were not uncommon. It was error in our opinion to conclude simply because the Price Control Act was admittedly violated and the expenditure was incurred as a direct consequence thereof that such expenditure was non-deductible [138] for income tax purposes.

“It seems to us that allowance of the sum paid to the Government may be allowed as a business deduction when the overcharge has been innocently and unintentionally made and not made through an unreasonable lack of care. The whole question resolves itself into proof with the burden on the claimant. Under such principle it is clear——”

We will eliminate that. They are talking about a fine.

“Where the payment has been made in circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law it would be an ordinary and necessary expense. Allowance of the deduction in these circumstances could not frustrate the enforcement of the Act.”

There is a very interesting footnote to the case which points to the fact that where a recovery is limited to the damages, that is to the exaction actually made, you see that evidences an absence of wrongful intent where the limit is not a minimum regardless of the amount. Now, where the limit is the minimum, the actual exaction, you see, and eliminates the trebling of damages, then you have simply a violation and you are free to show the circumstances under which that was arrived and why that was accepted. [139]

I was going to read from note 10, but that referred mostly—although I have summarized some of the holdings—that referred generally to the proposition that fixing of a damage of minimum, regardless of actually damages, evidenced an intent to impose a penalty to the violator as a deterrent rather than a method of restitution to the buyer.

Mr. Wyshak: Your Honor, my point is that it isn't a question of good faith or bad faith. The question is whether there was intent or not. In the next to the last paragraph of that opinion, it covers this.

“No payment to the Administrator made for overcharges in circumstances incompatible with innocence, or with reasonable care can be a necessary and ordinary expense.”

The Court: Well, then they modify it and say, “where the payment has been made in circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law it would be an ordinary and necessary expense.”

Mr. Wyshak: But here they intentionally billed, and it was an overcharge, your Honor.

The Court: Well, you are arguing against the facts. Just a minute.

Now, are you through?

Mr. Wyshak: Go ahead, your Honor. [140]

The Court: Well, if you aren't through arguing, I am going to stop. If you want to argue more, I will let you argue more. I am just giving you my reaction. I haven't decided the case yet. But it is not customary for a lawyer to start arguing over again when I begin to talk unless you are asked to do so. But if you want to present something, go ahead.

Mr. Wyshak: I am through, your Honor.

The Court: To show you how wrong you are in interpretation, let's look at 182 Fed. 2d 526.

“The case was submitted to the Tax Court on stipulated facts. In short, after examination of its books by O.P.A. investigators, petitioner admitted that between February 1, 1943, the effective date of such price regulations, and January 31, 1944, it

made sales of castings at prices in excess of the maximum prices so established. And, thereafter, 'in settlement of the Administrator's Claim for Treble Damages on account of violations of ceiling prices for non-ferrous castings', petitioner paid to the Government in 1944 the amount claimed and deducted on its 1944 return as a business expense."

So you have there an actual settlement of a claim for treble damages administratively on the basis of the allowance of the actual overcharges. And here you have a similar settlement, except that this settlement is after the suit [141] was brought. But I want to show you something else, that in this case the O.P.A. in its complaint did not seek treble damages. It merely sought such other relief as the court would grant. In other words, they themselves were not sure whether to ask for them, so they asked for general relief. And even if you admit that under that prayer the court could have granted them treble damages the fact remains that the complaint didn't seek them. This is one of those one-page complaints, and this is what they said. They allege that the defendant had violated the Act, and they didn't set forth the amount. And this was filed at the time when we were allowing them to file these blank. Later on we didn't allow them to file these blank complaints and required them to attach to the complaint a statement showing the exact amounts. Their argument was, "Well, we don't know the exact amount. We will prove it at the time of trial."

I said, "Give some indication." So this is what

they said: "For a preliminary injunction—" "—final injunction enjoining the defendant—" and so forth. "—from delivering tuna at excess prices, for such other relief—" They didn't specify any of the amount that had been paid or exacted in excess and didn't seek treble damages.

Mr. Wyshak: May I say something, your Honor?

The Court: Yes.

Mr. Wyshak: If I am not mistaken, your Honor, that complaint was filed after the check had been paid to the [142] Government. The check to the Government was in May. And I believe this consent judgment stipulation—

The Court: Well, I am not interested. But you are relying upon this consent judgment. This is not an administrative settlement.

Mr. Wyshak: Well, here is what I mean, your Honor,—

The Court: The payment to the Government is nothing. "It is stipulated here by and between the plaintiff, a corporation, that the defendant waives service of process that answers and all that may have the claim set forth in the complaint herein—" and so forth—"final judgment of the form annexed," and there was the form which issued the injunction. This was the 3rd of June, 1943.

Mr. Wyshak: Yes, your Honor. And the check for \$97,000 was paid over in May. In other words, this was something that came subsequent to that. If your Honor will refer to Exhibit 11, which is the letter from the French Sardine Company to Mr. Triggs.

The Court: Well then, the facts are the same. Then there was an administrative settlement. I thought that this judgment intended to cover the agreed settlement. If it was subsequent to it then we have exactly the same administrative settlement that we had in there.

Mr. Wyshak: Yes. What I wanted to point out, your Honor, in Exhibit 11, a letter from French Sardine Company [143] to Mr. Triggs points out that "The OPA investigators proceeded to tell us that we were extreme violators of the regulation and subject to fines for treble damages." So that the OPA did make a claim for treble damages.

The Court: You know, Mr. Wyshak, you are a very good—would you get me the Schneider case? You know, the other day in one of the most open and shut cases of family partnership you argued very eloquently that I ought to disallow it. I wonder if you read Schneider against Westover where the Court of Appeals reversed me in one of the partnership cases because I declined to allow a daughter to be included because she didn't perform any services. So I know your attitude, and I am not going to take the time I would have taken by analyzing the case, because it would merely mean I would get into an argument with you and I don't propose to argue with you.

I am satisfied on the facts in this case that this was not a willful violation; it was a fortuitous violation. There were discussions going on between these parties leading to the establishment of a higher ceiling than they had been allowed because

their prior price was held to be inadequate. Everybody from here to Washington agreed that the good faith is shown in the fact that in billing the goods through their brokers they stated that if the OPA should not recognize this as the basic price they would refund it, showing that at that time there were negotiations, which are undisputed [144] and established by the testimony of the Government's own witnesses. As a matter of fact it was expected at all times that the regulation would be changed and be made retroactive, as the OPA had a right to do that. The only reason why it wasn't put through was that they were too busy and when they got around to it they made the change conforming to what they had expected it would be, but they made it a few months later on.

Under the circumstances I think it would be a rank injustice not to allow the taxpayer, who endeavored so hard to conform to the law at the time when the Office of Price Administration itself was in the formative state and didn't know whether this comprehensive system would succeed, to penalize them by saying, "Well, they paid later on, admitted a violation. Therefore, they cannot recover."

I hold, therefore, that although they did make an administrative settlement, the evidence shows that the overcharges had been innocently and unintentionally made, and that they had taken reasonable care and had reasonable grounds to believe that a ceiling conformable to the discussions which had been going on informally would be established, which would enable them to do that. And all these

are evidence of good faith, and if I had the time I would take the time, but it would be a waste of time because it would merely bring more argument over the facts, and I don't propose to do that. [145] I merely wanted to indicate to counsel why I ruled as I do.

Therefore, judgment will be for the plaintiff, the amount to be computed according to Rule 7.

Mr. Grady: Thank you, your Honor.

Mr. Wyshak: Thank you, your Honor. [146]

[Endorsed]: Filed June 20, 1955.

PLAINTIFF'S EXHIBIT No. 1

MEMORANDUM

[Stamped]: Mailed Jun 7 1943 Legal Division.

In reply refer to: 2913:HAO June 5, 1943

To: John T. McTernan, Regional Enforcement Attorney, San Francisco Regional Office; from: Harry W. Jones, Assistant General Counsel, Food Enforcement Branch.

Per: Herman A. Greenberg, Chief Meat and Dairy Products Section.

Commodity: Canned Tuna Fish—GMPR

Subject: French Sardine Company, Inc., Terminal Island, California.

There is attached hereto copy of memorandum dated May 24, 1943, from the Los Angeles District Office to Harry W. Jones.

You will note that on Page 2 of the memoran-

dum Charles W. Triggs is quoted to the effect that he advised the French Sardine Company to violate GMPR and that he would quash any complaints that might be made because of the violation. It appears that the Los Angeles District Office took the ex parte statement of an officer of the Company as the basis for accepting single damages in settlement of the Administrator's treble damage action. On receipt of the memorandum we had a long discussion with Mr. Triggs. He assured us that at no time did he either recommend violation of the regulation or suggest that he might quash any proceedings for violation of the regulation. On the basis of Mr. Triggs' statement to us it appears that there is a substantial reason for accepting single damages. He claims that the Company had a fairly low ceiling under the GMPR last fall. The ceiling was \$11 per case while competitors ceilings went as high as \$17 per case. The Company was in constant communication with the Price Division of the National Office requesting relief and were assured that a dollar and cent regulation which would give them relief was to be issued momentarily. In fact MPR 299 was not issued until January 1943 at which time the maximum price for the tuna fish in question was fixed at \$12 per case. Pending the issuance of the regulation the French Sardine Company advised its customers that it was billing tuna fish at \$12 per case and that if a regulation issued by this office fixed a maximum price less than \$12 it would refund the difference to them. Apparently the Los Angeles office properly accepted the difference in

settlement of the treble damage suit by the Administrator and felt that there were mitigating circumstances justifying the acceptance of single damages. On the facts as we have them from Mr. Triggs, we are in agreement with the final action taken by the Los Angeles District Office and are therefore forwarding the Company's check to the Treasury.

We point out, however, that in this type of case where the District Office has some question in its own mind as to whether or not to accept a settlement it should request the advice of the Regional Office rather than communicating directly with Washington. The Washington Office is thus put in a position of exercising discretion which should have been exercised by the Regional Office. It is our understanding that Aaron Warner is sending you a more detailed memorandum on the general policy to be followed in the settlement of treble damage actions and the position of the regional office concerning those settlements.

Enclosure—HAGreenberg:sk

Certificate of Certification attached.

PLAINTIFF'S EXHIBIT No. 2

[Confirmation of Telegram sent French Sardine
Company, Terminal Island, California]

FH 124 NL—Terminal Island Calif. July 29, 1942

Charles M Elkinton

Office of Price Administration

Washington D C

After attending War Production Board hearing in Washington July Fourteenth our Sales Manager Williams visited principal markets throughout United States arriving back at plant today Stop He discussed wth brokers and trade generally the matter of ceilings particularly canned tuna and found our prices approximately three dollars case basis halves under competition Stop This fact is causing further confusion in price raw fish some competitors bidding higher prices also bonuses to fishermen Stop Would like see OPA take some action toward stabilizing situation by naming ceiling price in dollars and cents Stop Newspapers published today relief provision in favor of South Pacific Canning Company Long Beach making price ceiling 11.92 per case halves tuna please advise if we too may not have similar relief obliging

French Sardine Co Inc

ATW :lh

PLAINTIFF'S EXHIBIT No. 3

[Telegram]

War Production Board, Washington, D. C.

Telegraph Section Aug 10 2:33 pm '42 War Pro-
duction Board. Triggs

Via Postal Telegraph Via Western Union

W94 40 DL Food & Food Prod Price Br

SanPedro Calif 942A Aug 10 1942

Chas M Elkinton Office of Price Administration
(Washington DC)

If possible would appreciate very much receiving
wire answer collect to our letter of August First re-
garding relief on tuna price ceilings Stop Our op-
erations practically at standstill awaiting your re-
ply while competitors selling freely at higher prices
than ours

French Sardine Co Inc 224P

Than Ours

PLAINTIFF'S EXHIBIT No. 4

French Sardine Company

(Copy)

September 2, 1942

Office of Price Administration

1029 South Broadway

Los Angeles, California

Attention: Mr. L. M. Kearns

Gentlemen:

Complying with request in your letter of September 1st, File 8 LA LMK(P), we are enclosing herewith list of maximum prices at which we have made sales since the publication of The General Maximum Price Regulation of April 28, 1942. We ourselves, have not published or distributed a regular price list, but all of our sales, without exception, have been made on this basis since the effective date of the General Regulation, May 11, 1942.

We have not packed, quoted or sold any Tuna Flakes. We have packed and sold grated style only in lieu of flakes.

We did not make any Tuna sales in the month of March, 1942. In fact our supplies were so negligible we could not offer. Therefore, in arriving at our maximum prices, we placed them at levels equal to or below our closest competitor, which was the Van Camp Sea Food Company, Inc., Terminal Island, California.

While we did not possess the complete list of the Van Camp Sea Food Company, we did learn authoritatively that their price on Fancy Light Meat

Tuna was \$2.75 per dozen basis halves, and their price on Grated Tuna was \$2.58¾ per dozen halves. We then based our prices accordingly in the thought that as long as they were lower generally and no higher on any particular item, they were in line with the spirit and the letter of the General Regulation.

We follow a very definite sales policy making the same prices and the same discounts for all buyers alike. Enclosed list shows these prices and discounts. We have several brands for each grade, but make no price differential for brands.

We might refer to the items of Fancy White Meat Tuna and Grated White Meat Tuna. These packs were not available in Southern California during March, nor on the effective date of the General Regulation. The prices on these packs were based on costs and have, since the season started early in July, been uniformly close in the industry. Several weeks ago, according to printed and published articles, a tentative ceiling of \$16.00 per case of 48/1½s Fancy White Meat Tuna was established by the Office of Price Administration, although we have had no definite confirmation of this ceiling from Washington.

A different situation has existed continuously on Light Meat Tuna prices. There has been a variation of more than \$1.00 per dozen between canners above the prices shown on our list, and experience has proven that our prices have been the lowest quoted.

Frankly, we believe such discrepancies are unfair to us. We have gone on record with the O.P.A. in

Washington to the effect that the lowest ceilings should be increased and the highest ceilings decreased. We think the top ceiling should not be more than \$3.25 per dozen on halves Fancy and \$3.00 on halves Standard Light Meat Tuna. In fact we would not consider it unfair if ceilings were established on a basis 25c per dozen less.

We have recently supplied the office of Mr. Chas. W. Triggs in Washington with cost figures on our packs as well as selling prices on a month to month basis from January, 1941 to April, 1942, and we understand that all other canners have done likewise.

The Washington office is definitely trying to establish a dollar-and-cents ceiling on all Tuna and we assure you that no one desires prompt action in the matter any more than we do. We trust that this letter will cover your desires, and we will certainly appreciate any action you may take to expedite results.

Yours very truly,

French Sardine Company, Inc.

By A. T. Williams

ATW:aa—copy - mp

French Sardine Co., Inc., Maximum Prices
Canned Tuna

Prices per dozen cans	48/1½s	48/1s
Fancy Solid Pack White Meat Tuna	\$4.00	\$7.75
Fancy Solid Pack Light Meat Tuna	2.75	5.25
Standard Light Meat Tuna	2.50	4.75

new ceilings, we are beginning to feel the pinch financially. Therefore, we are today issuing instructions to all of our brokers who have received shipments, authorizing them to distribute and invoice the tuna on the basis of \$12.00 per case of 48/1½s Fancy, \$11.00 per case of 48/1½s Standard and \$10.00 per case of 48/1½s Grated Tuna.

On each invoice thus rendered we are noting a guarantee that if the OPA fails to promulgate an order stabilizing or equalizing prices on tuna before October 31st, we agree to revert back to our March ceilings, \$1.00 per case less basis 48/1½s and will refund each buyer accordingly.

We feel that we have been in a bad position ever since the General Maximum Price Regulation of April 28th. Since that time we have packed and shipped about 200,000 cases of tuna, all at the lowest ceilings in the industry. To give you some idea of the situation, Sun Harbor Packing Company and Westgate Sea Products Company have both packed more tuna than we have and they have sold at prices from \$2.00 to \$4.00 per case higher than ours, which means that they have profited by more than a half million dollars in excess of ourselves. Other smaller canners have profited in proportion.

In a conversation with our mutual friend, Roy Harper, of the Van Camp Sea Food Company, the other day, Roy informed us that new ceilings would shortly be announced which would be so low we would be shocked. Therefore, we would like to give you our viewpoint of Van Camp's position.

It is true that their ceiling on Fancy tuna is

\$11.00 per case. It is also true that their ceiling on Standard tuna is \$9.50 per case. But they also have a ceiling on Grated tuna at \$10.35 per case and they have specialized on Grated tuna, packing and selling no standard and only a very small percentage of Fancy. A fine profit may be made on Grated tuna at \$10.35 per case even using whole tuna in the grating process as well as the broken pieces from other packs, because Grated has a lower net content in the can than either Fancy or Standard with a greater yield per ton of fish and labor costs are much lower. Furthermore we understand that consideration is being given the matter of a preferred ceiling price for advertised packs, and, in all fairness, we believe such consideration is entirely correct. This would work to the advantage of Van Camp.

In addition to this, Van Camp has (through their own commendable efforts) established a profitable business on products from tuna livers and oils, which has grown to an extent which might even cause them to lose interest in possible profits on canned tuna. A very low ceiling on canned tuna might not discommode Van Camp but might be harmful to other canners who did not have the foresight to develop a business on the livers and oils from tuna.

We think, perhaps, for one reason or other, which might be disadvantageous to individual canners, all of us may be giving information which has proved to be at cross purposes in obtaining a uniform ceiling. We, too, are perhaps selfish in some

of our views although we try to avoid that angle as much as possible.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:mp

PLAINTIFF'S EXHIBIT No. 6

[Letterhead of French Sardine Company]

Via Air Mail

November 6, 1942

Mr. Charles W. Triggs

Head, Fish Section

Office of Price Administration

Washington, D. C.

Dear Mr. Triggs:

We note inquiry in your letter of October 30th regarding price of raw tuna about which we referred in our letter of October 26th. We smoked this out at the meeting of the California Fish Canners Association last week. Here is the dope:

It goes back to the time early in the season when Crivello and Simon caused the price of tuna to jump from \$160.00 to \$190.00 per ton. Shortly after this Crivello started paying a bonus of \$10.00 per ton. Then on August 25th, Crivello came into the open and started showing a price of \$200.00 per ton on his fish tickets. Shortly afterwards Crivello again tried to entice some Van Camp boats over to him by offering the owners a bonus of \$10.00 a ton and Van Camp held his boats by meeting the offer. Therefore while the price of fish is not now \$210.00

per ton, as the fishermen on the boats do not participate in the bonus, actually it amounts to the same thing as all canners in San Diego were obliged to meet this proposition, and all tuna brought in by the large high sea boats since August 25th will be paid for at \$200.00 for Yellowfin, \$190.00 for Bluefin and \$180.00 for Striped Tuna, plus a bonus of \$10.00 per ton on each species to the boat owners.

Now we wrote to you on September 24th that we were invoicing tuna, which we shipped several weeks ahead of that date without invoicing, at a price of \$12.00 per case of 48/1½s Fancy, \$11.00 per case of 48/1½s Standard and \$10.00 per case of 48/1½s Grated. We agreed to refund buyers \$1.00 per case if OPA failed to announce definite dollars-and-cents ceilings which would equalize and stabilize the tuna situation. Recently we have continued to ship and invoice on the same basis without the refund agreement although, if we start making refunds we expect to treat all buyers alike as that is our general policy.

Since October 1st we have packed no tuna in our plant at Terminal Island as we cannot get help enough to operate at capacity on Sardines, which we are supplying mostly to the Government. We have AMA contracts now for Pilehards in the amount of more than 300,000 cases, half of which are already shipped, and we are offering today another 85,000 cases.

We could ship tuna from the plant which we control in San Diego, The High Seas Tuna Packing

Company, at their ceilings which are \$15.00 for Fancy, \$13.50 for Standard and \$12.50 for Grated. However, we prefer to distribute our own brands to our own markets at the lower price in an effort to service customers who have been loyal to us for years.

It is impossible for us to hold large quantities of tuna awaiting action by the OPA on account of the immense amount of money involved. We must continue operating as the only alternative would mean complete liquidation. Therefore we trust that we are not putting our necks in a sling by taking the action noted herein.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:mp

PLAINTIFF'S EXHIBIT No. 7

[Letterhead of French Sardine Company]

Via Air Mail

November 16, 1942

Mr. Charles W. Triggs
Head, Fish Section,
Office of Price Administration
Washington, D. C.

Dear Mr. Triggs:

We are enclosing herewith original letter, dated November 13th, which we received today from the

State Enforcement Attorney of the Los Angeles office of OPA. We are also enclosing copy of our letter of September 2nd, to which they refer, together with copy of our reply to their latest letter.

There are many misstatements in their letter to us. The second paragraph of their letter is substantially correct, except that we made no mention of the manner in which we arrived at our Tonno ceiling in our letter of September 2nd. That information was given verbally and you are already familiar with it.

In the third and fourth paragraphs of their letter, they state that we shopped our competitor, Van Camp Sea Food Company. At no time did we ever make such a statement. We explained in our letter of September 2nd how we arrived at our price of \$16.00 per case of 48 1/2s Fancy White Meat Tuna and this matter was discussed at a Los Angeles conference, where, according to our understanding, this price was considered an acceptable ceiling.

Nothing was said about a price of \$31.00 on 48/1s Fancy White Meat or any price on Grated White Meat. We arrived at our price on these items by following the custom of the industry prior to any government action in the matter, and felt that we were correct in this, based particularly on the fact that when you granted relief to the South Pacific Canning Company on Tuna, you gave them a ceiling on 48/1 1/2s only without specifying sizes or grades.

We know that you are familiar with action we have recently taken on Light Meat Tuna, as we have written to you several times about it. However, their statement that we are selling Eatwell Standard Tuna at 65 cents over the ceiling of Van Camp is incorrect. The fact is that Van Camp's price, to which they refer is for Grated Tuna and our latest price on this item is \$10.00 per case of 48/1½s, which is 35 cents under Van Camp.

The whole thing boils down to a point which we have tried to make on many occasions, that when impractical and theoretical attorneys, doing what they, no doubt, feel is their duty, start enforcement proceedings against citizens who are doing their best to comply with existing laws, they simply cause more serious and real injustices than do the laws themselves.

We have been hoping, of course, that some announcement would be forthcoming from your office, which would alleviate our position, but, in lieu thereof, we would appreciate your advice in our present difficulty, obliging

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:mp—Encls.

PLAINTIFF'S EXHIBIT No. 8

French Sardine Company

Office of Price Administration Nov. 16, 1942
1037 South Broadway
Los Angeles, California

Attention: H. Eugene Breitenbach

Gentlemen:

We refer to your letter of November 13, 1942,
File 8 LA:GS(L).

Before giving you a definite answer, we are sending your letter to Mr. Charles W. Triggs, Head, Fish Section, Office of Price Administration, Washington, D. C., along with a copy of our letter to Mr. Kearns, September 2nd, to which you refer. Our reason for doing this, is that we are still very much confused in the matter of jurisdiction between the Los Angeles and Washington offices.

As far back as April, 1942, we have been striving to arrive at a stabilized or equalized ceiling on all tuna packs. At first we dealt exclusively through Mr. Edward Maher of the Regional Office in San Francisco. We were then given to understand that we should deal with Washington direct. We have been in contact with Mr. Triggs in Washington innumerable times by telephone and telegraph and have made three trips to Washington to discuss ceilings.

At the same time we have tried to cooperate with the Los Angeles office whenever we were requested

to do so. We took occasion during a recent conference in Los Angeles to express our views about enforcement agencies taking over before ordinary laymen like ourselves could possibly obtain a fair decision in connection with the legally framed General Maximum Price Regulation order of April 28th. We base this statement on a speech made by Secretary Wickard at a meeting which we attended in Washington, May 8th, in which he said: "We know that there are many errors in the General Maximum Price Regulation. We know there are many inequalities. We know that the order was hastily prepared and that many canners will be discriminated against and that many will be treated unfairly. Therefore we must concern ourselves and continue working to the end that these inequalities be eliminated. We want production and we do not want anything in this regulation to retard production."

The above speech was made in the presence of about one hundred representative canners from all over the United States as well as both officials and attorneys of the OPA and the Department of Agriculture. We contend that nothing definite has been done to relieve the tuna situation.

All of this, in your opinion, may be beside the point. Therefore, while we are awaiting a reply from Washington to our letter today, we would appreciate receiving your advice as to whether the information you request from us applies to Los Angeles County, Southern California, the State of California and/or the entire United States. Please

be sure of our desire to cooperate with you to the fullest possible extent.

Yours very truly,

French Sardine Company, Inc.

By A. T. Williams

ATW:mp—cc. Chas. W. Triggs, Washington, D. C.

PLAINTIFF'S EXHIBIT No. 9

[Letterhead of French Sardine Company]

Mr. Chas. W. Triggs,

Dec. 5, 1942

Dear Mr. Triggs:

Believe you will find attached letters self explanatory.

Yours very truly,

French Sardine Co., Inc.

/s/ A. T. Williams

PLAINTIFF'S EXHIBIT No. 10

French Sardine Company

Office of Price Administration

Dec. 5, 1942

1037 South Broadway

Los Angeles, California

Attention: Mr. H. Eugene Brietenbach, Senior
Enforcement Attorney

Gentlemen:

We refer to your letter of December 3, File 8
LA:GS(L).

May we state at the outset that we have no in-

tention of dodging the issue in your previous letter of November 13. While there are many errors in the allegations which you make, we will not discuss them here, but rather try to cover the general charges involved.

We admit that we increased the price on our different packs of Tuna late in September. We did so on following premise:

On July 14 and 15, we visited the Washington office of the OPA. We were told then that we might soon expect a stabilized and equalized ceiling on Canned Tuna in a short time. We therefore withheld shipment of any Tuna until the last week in August, accumulating in the meantime more than 50,000 cases with a value over a half million dollars.

We talked with your Washington office by telephone once or twice a week during this period. Finally, the last week in August, we asked the point blank question: "Would we be taking any chance if we shipped our Tuna without invoicing any of it, with the understanding that a new ceiling would be announced by OPA by the time shipments arrived at destination?" We were informed that we would not be taking any chances, as, undoubtedly, a new ceiling would be promulgated before the Tuna could arrive.

Unfortunately, no announcement was made, so we notified our brokers to distribute the Tuna on arrival, to responsible buyers, awaiting later invoicing, and guaranteeing that the price would not

exceed \$1.00 per case basis 48/1½s more than our March ceilings. We waited until September 24 for some action. We then wrote an airmail letter to Washington, advising them that we were going to invoice the Tuna at a price \$1.00 per case above our March ceilings, but making an agreement with the buyers that we would refund \$1.00 per case, to bring our prices on a level with March ceilings if we failed to obtain a new ceiling by October 31.

We failed to receive any approval of our action and therefore made another trip to Washington in order to learn if we had "stuck our necks out." We held a conference with OPA officials, including at least one of their attorneys, and were told that they could not officially approve our action. We were further told that we certainly were entitled to the higher price and, therefore, we could use our own judgment inasmuch as we were not given an official disapproval of the action.

In the meantime an order, effective October 15, was issued by OPA, which granted relief to Wholesalers and Retailers on a percentage based on costs. This placed us in a most embarrassing position for the reason that, if the buyers took advantage of our agreed refund in establishing ceilings during the month of November, it would mean that they might in future be unable to handle Tuna as they would be unable to get supplies at the low price. Furthermore, we would be obliged to develop new markets as our regular markets would be frozen at lower levels than we could possibly meet.

Our offer to refund all buyers to the basis of our March ceilings still stands, but the buyers are reluctant to accept any refunds as they, too, know we are entitled to the new prices, which are still lower than any competition, not even excepting the Van Camp Sea Food Company, to which firm you refer in your November 13 letter.

Now we are forwarding a copy of this letter to Mr. Chas. W. Triggs, Head of the Fish Section, OPA in Washington, together with a copy of your letter to us. He has failed to answer our previous communications about the same matter, but, no doubt, he is so busy with more important items that he just cannot get around to a small commodity like Tuna. We are confident that he will advise both your office and ourselves regarding the difficulty.

Please be sure that we desire to avoid any conflict between the Los Angeles and Washington offices of the OPA. We assure you of our wish to do what is right and will be guided by instructions which we receive.

Yours very truly,

French Sardine Company, Inc.

By A. T. Williams

ATW:mp—cc. Mr. Chas. W. Triggs, Head, Fish Section, Office of Price Administration, Washington, D. C.

PLAINTIFF'S EXHIBIT No. 11

[Letterhead of French Sardine Company]

Mr. Charles W. Triggs

April 29, 1943

Head, Fish Section

Office of Price Administration

Washington, D. C.

Dear Mr. Triggs:

On April 28, just a year and a day since the issuance of the General Maximum Price Regulations, we were favored with a visit from two really tough attorneys, Messrs. Brinn and Breen, from the enforcement agency of the O.P.A. in Los Angeles.

They instructed us to compile within ten days a list of each and every invoice issued by us covering any and all Tuna which was priced differently than our purported March ceilings. They proceeded to tell us that we were extreme violators of the regulations and subject to fines for treble damages.

We will not attempt to discuss details as we know you are very busy and are also quite familiar with action which we took. Suffice it to say that it will require the services of four people for a week or more to examine and list several thousand invoices. It will involve close to 150,000 cases of Tuna, which, based on treble damages, would mean a fine of close to a half million dollars.

The Los Angeles office seems to be quite concerned over the fact that we contacted you, in the Washington office, instead of themselves regarding

our troubles. They told us that this was a sad mistake on our part. Whether this has anything to do with their present enforcement activities we do not know, but the fact remains that they, evidently, mean to knock us over after they learn the full extent of our so-called misdeeds.

Any advice you might give us which would be helpful and any action you might take to alleviate the situation would be sincerely appreciated. Please let us hear from you.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:aa

PLAINTIFF'S EXHIBIT No. 12

Mr. A. T. Williams

May 6, 1943

French Sardine Company

Terminal Island, California

Dear Mr. Williams:

This will acknowledge receipt of your letter of April 29 regarding a visit you had from two of the attorneys from the Enforcement Division of the Los Angeles Office of Price Administration. I note that they requested copies of your invoices and other information about the prices you have charged.

We have not heard from the Los Angeles office regarding this, but no doubt we will be fully ad-

vised. We will be very interested in the outcome of your conference.

Very truly yours,

Chas. W. Triggs, Head, Fish
Section, Food Price Division

CWTriggs:ew

PLAINTIFF'S EXHIBIT No. 13

[Letterhead of French Sardine Company]

Mr. Charles W. Triggs
Head, Fish Section
Office of Price Administration
Washington, D. C.

May 6, 1943

Dear Mr. Triggs:

Well, we had our day in court with Mr. H. Eugene Breitenbach, Senior Enforcement Attorney, at the Los Angeles office of O.P.A. We put every card we had on the table and received an answer which represented just about what we expected. We were told that we had violated the General Maximum Price Regulations although it was admitted that we did not violate the intent or purpose of the act.

Then we were told that, in view of the extenuating circumstances, the enforcement agency would be lenient to the extent that they would consider the matter closed if we would present them with a check in favor of the Treasurer of the United States for the exact amount, not treble damages, of

what they considered the excess charges, as a contribution to the war effort.

We are still checking our invoices and find that the total involved will be between \$97,000.00 and \$100,000.00, representing \$1.00 per case, basis 48/1/2s Tuna. This is not as much as we first estimated because we did not have to report on White Meat Tuna (Albacore), Bonita, Yellowtail or Tonno, on which no violations occurred. We still feel that we are not being treated fairly or justly by reason of the fact that we were the lowest sellers throughout the year 1942. We were told that, inasmuch as the matter is in the hands of the enforcement agency, we have no other recourse but to comply with their offer of settlement.

Now, we would like to refer to another matter which is, evidently, going to cause a lot of friction and dissatisfaction. We refer to the matter of your ruling about War Risk Insurance being included in the \$200.00 ceiling on Tuna. Frankly, Mr. Triggs, we believe you are wrong. We must doubt if you have given the situation sufficient consideration.

We attended a meeting yesterday afternoon regarding War Risk Insurance. This meeting was attended by Wade Ambrose, of Westgate; Gilbert Van Camp and Montgomery Phister, of Van Camp; Racey Biven, of Coast; Martin Bogdanovich and the writer, of French Sardine; Landers and Wallace, of San Diego Tuna Boat Association; McCaffery and another gentleman from Lower California Fisheries Association. All agreed that War Risk Insurance was not discussed at your meeting

in Los Angeles, March 26. All expressed their understanding that War Risk Insurance was to be handled by the canners as an overhead item removed entirely from the cost of fish, in accordance with precedent set since the start of the war.

Mr. Biven recited an instance of what might often happen if fishermen were required to pay their own insurance. One boat went on a trip which kept them out ninety days and they returned with eight tons of fish. With 11½ percent premium for each thirty days based on the value of the boat plus \$5,000.00 on the life of each fisherman, you may readily understand that his revenue from fish sold would be far from sufficient to pay his insurance, let alone his other expenses.

The next day another boat came in from a nineteen day trip, bringing 200 tons. Incidents such as related here occur very frequently, and, naturally, the net income of all fishermen would vary considerably throughout. On the other hand, if canners paid the insurance, while there might well be a variation in costs between them, it did and will continue to average down to a fairly low level. This, of course, depends on average conditions prevailing. If something dire happened the rate of War Risk Insurance could change violently over night. The rate might become prohibitive, in which case fishing operations would cease. Any advance in rates would only make the situation more acute for the fishermen, although the canners could stand it up to a certain limit.

At the meeting yesterday, the fishermen's repre-

sentatives told us that many individual fishermen were accusing the cannery of making frequent trips to Washington and prevailing on yourself to make rulings which are opposed to their interests and simply giving them the squeeze. Of course, this was correctly denied, but to appease them it was decided to apply for relief to the Los Angeles and San Diego branch office of O.P.A.

In passing, we might add that the attorneys who recently visited our own office told us definitely that we made a mistake in going to Washington with our troubles as the Los Angeles office could give us all the answers in a better manner much sooner. They told Van Camp the same thing and are probably passing the word along down the line.

In conclusion, we will give you our ideas on the roll back of Tuna prices. We believe that under present conditions, with no unforeseen developments which might cause costs to increase abnormally, you would not cause a hardship on the industry if you set new ceilings on White Meat Tuna from \$1.00 to \$1.50 per case of 48/1½s below present levels, and a reduction on Light Meat Tuna, not including Bonita or Yellowtail, of fifty cents per case basis 48/1½s. This could be explained by the lowering of the cost of Albacore in the amount of \$75.00 per ton or more, and the elimination of bonus payments for Light Meat Tuna.

Our idea of a correct ceiling for fresh market fish, including particularly Albacore, which is mostly used for canning, would be on a basis of five cents per pound higher than the canner levels. This

would make Yellowfin \$300.00 per ton or 15 cents per pound, and would prevent certain canners we might mention from entering the fresh fish business in order to obtain additional supplies for canning, and also prevent any canner from purchasing fish from fresh fish markets. We refer to those fellows who fail to follow the general practice of investing in, or financing boats for themselves.

We would greatly appreciate any suggestions you might give us in connection with the Breitenbach ruling either by collect wire or air mail. The attorneys are coming to our office Monday, May 10, to obtain our list of invoices.

Thanks for your attention. We hope we have not bored you.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:aa

PLAINTIFF'S EXHIBIT No. 14

Mr. A. T. Williams

May 19, 1943

French Sardine Company

Terminal Island, California

Dear Mr. Williams:

This will acknowledge receipt of your letter of May 6. I note your remark concerning your meeting with the enforcement attorneys at Los Angeles and the decision that was made. We have heard

nothing as yet from the Los Angeles Office about this matter.

On May 15 I wired you regarding our decision on the payment of war risk insurance.

We are giving careful consideration to the question of the sale of fresh tuna to wholesale dealers, and we may be able to provide for this in our new fresh fish regulation.

Very truly yours,

Chas. W. Triggs, Head, Fish
Section, Food Price Division

CWTriggs:dg—5/19/43

PLAINTIFF'S EXHIBIT No. 15

Mr. A. T. Williams
French Sardine Company
Terminal Island, California

July 7, 1943

Dear Mr. Williams:

I received your letter of June 17 and carefully noted your remarks regarding the press release covering the payment you made to the Office of Price Administration for over-charge on tuna and the payments made by other companies.

I fully realize the position your company was placed in by having lower ceilings than your competitors. The March ceilings were far from being equitable. Now that we have established uniform ceilings on practically all varieties of fish, this cannot happen again.

I trust you will have a very successful season in 1943.

Kindest regards.

Very truly yours,

Chas. W. Triggs, Head, Fish Section,
Food Price Division

CWTriggs:ew

PLAINTIFF'S EXHIBIT No. 26

In the District Court of the United States, Southern District of California, Central Division

No. 2960-BH

Prentiss M. Brown, Administrator, Office of Price Administration, Plaintiff, vs. French Sardine Company, Inc., a corporation, Defendant.

COMPLAINT

1. In the judgment of the Price Administrator the defendant has engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 as amended (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23) hereinafter called "the Act" in that defendant, as more particularly hereinafter alleged, has violated General Maximum Price Regulation as amended, effective in accordance with the provisions of said Act, and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Regulation.

2. Jurisdiction of this cause of action is conferred upon this Court by Section 205(c) of the Act.

3. At all times herein mentioned there has been in effect, pursuant to said Act, General Maximum Price Regulation as amended, establishing a maximum price for canned tuna fish and other sea foods, and that the maximum price thereof, established by said General Maximum Price Regulation as amended, is the highest price for which said commodities were sold during the month of March 1942 by defendant, or if said commodities were not sold during the month of March 1942 by defendant, the maximum price thereof established by said General Maximum Price Regulation as amended is the highest price for which such commodities were sold during the month of March 1942 by defendant's most closely competitive seller.

4. Defendant, a packer and canner of canned tuna fish and other sea foods, at all times herein mentioned doing business at Terminal Island, County of Los Angeles, State of California, sold no canned tuna fish during the month of March 1942, but since and including May 11, 1942, the effective date of General Maximum Price Regulation as amended, at wholesale, defendant sold and delivered at wholesale canned tuna fish at prices higher than the maximum price for which defendant's most closely competitive seller sold said commodity, as determined by said General Maximum Price Regulation as amended, during the month of March 1942.

Wherefore plaintiff prays for relief as follows:

1. For a preliminary and final injunction, enjoining the defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the defendant, from directly or indirectly selling or delivering canned tuna fish and other sea foods at prices in excess of the maximum prices established by said General Maximum Price Regulation as amended, or attempting or agreeing to do anything in violation thereof, or in violation of any regulation or order issued pursuant to the Emergency Price Control Act of 1942 as amended, establishing a maximum price for canned tuna fish and other sea foods.

2. For such other and further relief as the Court may deem just and proper.

[Seal] /s/ Frank S. Balthis, Jr.,
 Chief Attorney
 /s/ John J. Ford,
 Chief Enforcement Attorney
 /s/ H. Eugene Breitenbach,
 Chief Litigation Attorney

[Endorsed]: Filed June 3, 1943.

PLAINTIFF'S EXHIBIT No. 27

[Title of District Court and Cause No. 2960.]

STIPULATION

It Is Hereby Stipulated by and between plaintiff, Administrator of the Office of Price Administration, by counsel, and the defendant French Sardine

Company, Inc., a California corporation, by it and by its counsel, that:

1. The defendant waives service of process, answer and any and all defenses that it may have to the claim set forth in the complaint herein, hearing, findings of fact and conclusions of law; and

2. A final judgment, in the form hereto annexed, may be entered against the defendant without notice at any time hereafter.

Signed at Los Angeles, California, this 1st day of June, 1943.

French Sardine Company, Inc.,
a corporation

[Seal] /s/ By M. J. Bogdanovich, President

/s/ By [Illegible], Secretary

/s/ John V. Morris, Attorney for
Defendant

/s/ H. Eugene Breitenbach, one of the
attorneys for Plaintiff

[Endorsed]: Filed June 3, 1943.

PLAINTIFF'S EXHIBIT No. 28

[Title of District Court and Cause No. 2960.]

JUDGMENT

Plaintiff having filed his complaint, and the defendant having appeared by counsel, and having waived service of process, answer, and all defenses to the claim set forth in the complaint which it might have, hearing and findings of fact and con-

elusions of law, in accordance with a stipulation between the parties hereto, entered into on the 1st day of June, 1943, and filed in the office of the Clerk of this Court, and defendant having agreed in said stipulation to the entry of the final judgment in the form set forth below, and sufficient reasons appearing therefor;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the defendant, be and they are hereby permanently enjoined from directly or indirectly selling or delivering canned tuna fish and other sea foods at prices in excess of the maximum prices established by said General Maximum Price Regulation as amended, or otherwise violating said General Maximum Price Regulation, or attempting or agreeing to do anything in violation thereof, or in violation of any regulation or order issued pursuant to the Emergency Price Control Act of 1942 as amended, establishing a maximum price for canned tuna fish and other sea foods.

It Is Further Ordered, Adjudged and Decreed that jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification thereof, and enforcement or compliance therewith, and for the punishment of violations thereunder.

Dated at Los Angeles, California, this 3rd day of June, 1943.

/s/ Paul J. McCormick,
United States District Judge

Consent to the entry of the foregoing decree is hereby given.

/s/ Frank S. Balthis, Jr., Chief Attorney

/s/ John J. Ford, Chief Enforcement Attorney

/s/ H. Eugene Breitenbach, Chief Litigation Attorney

Consent to the entry of the foregoing decree is hereby given.

French Sardine Company, Inc., a corporation

/s/ By M. J. Boganovich, President

/s/ By [Illegible], Secretary (Seal)
Defendant

/s/ John V. Morris, Attorney for Defendant

[Endorsed]: Judgment entered and filed June 3, 1943.

PLAINTIFF'S EXHIBIT No. 32

[Invoice Heading of Franch Sardine Company]

Invoice T No. 41129; Date: Sept. 26, 1942; Shipping Order No. 34224; Sales Memo No. 6260; Terms: 1½%-(\$1796 10 days due 10/6/42); F.O.B. Terminal Island.

Sold To: D. F. De Bernardi & Co., 201 Broadway, San Francisco, Calif.

Shipped to: Same.

How Shipped: Via Snowden Transportation Co.— Freight Prepaid.

Broker: F. A. Davis Co., San Francisco, Calif.

100 CS 48/½ Belle Isle Sld Pk

Yellowfin Tuna	1200	1200.00
--------------------------	------	---------

Less Swell Allowance ¼%		3.00
-----------------------------------	--	------

1197.00

Plus Freight 2850 lbs - 28 Cwt.		7.98
---	--	------

1204.98

Stop Charge		1.06
-----------------------	--	------

1206.04

Please remit in accordance with this Invoice. If O.P.A. fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/½s and \$2.00 per case less on 48/1s, and will refund you accordingly.

French Sardine Company, Inc.

Shipping Instructions

Date: Sept. 23, 1942

No. 34224

Ship to D. F. DeBernardi & Co., 201 Broadway,
San Francisco, Calif.

Destination: Same.

Via Snowden Transportation Co. Freight Prepaid.

Cases	Size	Label	Commodity	Weight
100—48/1 $\frac{1}{2}$ s	Belle Isle	Sld Pk	Yellowfin Tuna	2850#

French Sardine Co., Inc.

By LH

In full

Accounting Dept. Copy

PLAINTIFF'S EXHIBIT No. 35

[Letterhead of French Sardine Company]

To Our Brokers:

August 20, 1942

Recently, even prior to the opening of the Northern California Sardine Season last week, at least one Northern California Canner made definite offers on Sardines at prices which indicated that he had a high ceiling in March. We understand that bookings are subject to pack, subject to government release and other exceptions which would make contracts meaningless, but which, nevertheless have a tendency to "muddy the waters", and the action has certainly cost us a good many dollars answering wires and letters.

In our opinion, such action is in direct violation of War Production Board Order No. M-86B. How-

ever, we always have to contend with the ideas of certain men who seem to proceed without regard to law or government orders in extreme emergencies or otherwise and defiantly show that they are going to run their own business as they see fit. We, of course, may not judge their motives because circumstances may sometimes be deceiving.

As far as we are concerned, it will be our policy to cooperate with the government and we do not propose to take any steps that might in any way interfere with or confuse the war effort. Please be sure that we will make every endeavor to protect our distribution in the civilian trade and particularly are we anxious to insure the position of our good broker representatives.

We are confident that our government agencies will, when the time is ripe, regulate ceilings which will be fair to all and also, if possible, release some California canned fish for regular trade channels. You may depend on it that we will definitely advise you what we can do just as soon as we are in position to do so.

The above applies mostly to sardines, but the situation is quite similar on Mackerel and Tuna. No Mackerel has been packed in the Los Angeles Harbor district since March. There have been some small packs in San Diego, but the government is taking it as fast as packed and, inasmuch as they have already announced their requirements as 500,000 cases, indications are not favorable for any releases.

The demand for tuna still greatly exceeds the supply of all varieties, including Albacore, and now the Army is requesting bids on upwards of 50,000 cases.

/s/ French Sardine Company, Inc.

ATW:ab

[Letterhead of French Sardine Company]

To Our Brokers:

September 24, 1942

For the benefit of those who failed to see published reports, we are listing below ceiling prices promulgated by the Office of Price Administration order No. 209 under date of August 26th, 1942, effective August 31st—

48/1s Oval Sardines in Tomato or Mustard..	\$4.62
48/1s Oval Sardines Natural	4.52
48/1s Tall Sardines Tomato or Mustard.....	3.95
48/1s Tall Sardines Natural	3.60
96/8 oz. Sardines in Tomato or Mustard....	5.25
96/8 oz. Sardines Natural	5.00
100/5 oz. Sardines in Tomato or Mustard....	4.65
100/5 oz. Sardines Natural	4.40

Note: There will be no 96/8 oz. or 100/5 oz. Sardines for civilian trade. There may be some Ovals and Talls released later, but not until government requirements are filled.

French Sardine Co., Inc.

ATW/co

[Letterhead of French Sardine Company]

To Whom It May Concern:

Sept. 24, 1942

We have shipped several cars of canned fish to certain markets during the past thirty days. We have issued instructions to distribute the merchandise, invoicing the buyers for those items on which there were definite ceiling prices and holding the balance of the billing in abeyance, awaiting an expected new ceiling order from the Office of Price Administration which would relieve the tight situation in which we have been placed by our March ceilings on some items.

We have been advised many times direct from the Washington office of O.P.A. about their intent to equalize the vast differences in prices between canners. We have been repeatedly told that we may expect an increase on the low ceilings and a decrease of the high ceilings.

When on August 26th, the O.P.A. actually took this step on the item of California Sardines, we believed that similar relief would be forthcoming shortly on the other items. However, these government agencies have so many angles and so many people to please or placate that undue delays sometimes arise.

In order to facilitate matters and to improve our financial status we propose the following procedure:—

On receipt of this letter, please arrange to in-

voice all buyers who have received merchandise at the following prices:—

48/1½s	Fancy Solid Pack Tuna.....	\$12.00
48/1s	Fancy Solid Pack Tuna.....	23.00
48/1¼s	Standard Tuna	6.50
48/1½s	Standard Tuna	11.00
48/1s	Standard Tuna	21.00
48/1½s	Grated Tuna	10.00
48/1s	Grated Tuna	19.00
48/1½s	Bonita	10.00
48/1½s	Flaked Yellowtail	10.00

Above prices are F.O.B. Coast, usual terms. Be sure to add freight, which was prepaid. Then make the following notation on each and every copy of invoices covering packs of light meat tuna only:

“Please remit in accordance with this invoice. If O.P.A. fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1½s and \$2.00 per case less on 48/1s, and will refund you accordingly.

French Sardine Company, Inc.”

In conclusion, we may only state that we have been badly disappointed by the long delays. We trust that something may soon be done to clear the tuna situation satisfactorily and that our present action may meet with the approval of all concerned.

French Sardine Company, Inc.

[Letterhead of French Sardine Company]

September 24, 1942

Information Letter

Sardines

September 17th, Roy F. Hendrickson, Administrator of the Agricultural Marketing Administration notified all California canners that government requirements of sardines for the 1942-1943 packing season have been increased from 2,500,000 cases to 3,325,000 cases. He also requested the industry to pack exclusively for government requirements until government needs are filled.

This notification needs little comment. It simply means that there will be no early, if any, releases of sardines for civilian trade. With the fishing fleet reduced approximately fifty percent below last season, we may not reasonably expect to reach the record pack of 5,000,000 cases made during the 1941-42 season. In fact, we must be optimists to anticipate a total pack over 4,000,000 cases.

This should indicate to you our reasons for failing to accept either firm orders or memorandum bookings. Please bear with us in this matter and rely on us to make fair allotments of Sardines when and if they are available.

Mackerel

The government has stated its requirements to March 31, 1943, as 500,000 cases. Practically none has been packed since the season opened July 1st. The shortage of Mackerel fishing boats is even more acute than sardine boats. We have found no one so

foolhardy as to predict a total Mackerel pack sufficient to supply government needs. Therefore, unless some very unexpected change occurs, it appears that Mackerel is out as far as civilian trade is concerned.

This government action may work a severe hardship on some brokers and buyers. However, we must all cooperate with our government agencies in their fine efforts with the War program. We are sure we may depend on your united support to insure the end we are seeking.

ATW:lh

French Sardine Company, Inc.

[Letterhead of French Sardine Company]

To Our Brokers:

October 20, 1942

We are enclosing herewith brokerage check for September sales. Please note that this check does not represent the exact amount of brokerage due. We withheld a small percentage in an effort to avoid confusion which may result if the Office of Price Administration does not give us promised relief on or before October 31st. It may be necessary for us to refund the buyers, who have paid for tuna at the new prices.

Your brokerage will be properly adjusted when we send your checks in November covering October earnings, and a brokerage statement showing any necessary adjustments will accompany our check at that time.

ATW:lh

French Sardine Company, Inc.

[Letterhead of French Sardine Company]

December 1, 1942

Important Notice

Effective December 1, 1942, there will be a three percent Federal Tax added to all freight bills. This tax must be passed on to the buyers and it will, therefore, be necessary to show same on all freight items as a separate entry on all invoices.

French Sardine Company, Inc.

P.S.: Please note that correct weight for billing 48/1s Oval Sardines packed in Solid Fibre cartons is 61 lbs. per case. Kindly watch this.

ATW:lh

[Letterhead of French Sardine Company]

To Our Brokers:

January 4, 1943

During the early morning hours of January 2nd a fire of undetermined origin broke out, causing the complete loss of our new Plant No. 2. Under present conditions, it is extremely doubtful if we may rebuild on account of shortage in building supplies and necessary machinery.

Included in the loss, we were holding for shipment against government contracts approximately 26,000 cases of canned sardines. We do not know at this time, and probably will not know for at least thirty days, whether we will receive any relief from the government in the matter of delivery. We rather believe that the government will expect us

to complete our contracts from packs in our main plant, which we may reasonably hope to make during the balance of the packing season.

This loss is certain to reduce our allotments for civilian trade, which allotments are now only twenty percent of total packs in accordance with amendment to order M-86b, December 24th, 1942, which definitely sets government requirements at eighty percent of packs.

We, therefore, request that you do not press us for deliveries of any canned fish. Please, rather, depend on us to distribute what packs may be available in as fair and equitable a manner as is physically possible for us to do so. We are deliberately giving you the dark side of the situation in the faint hope that a ray of sunshine in the way of heavy packs may develop later so that we may do better than present conditions indicate.

ATW:lh

French Sardine Company, Inc.

[Endorsed]: No. 14794. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Star-Kist Foods, Inc. (formerly The French Sardine Company of California). Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: June 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14794

UNITED STATES OF AMERICA,
Appellant,
vs.

STAR-KIST FOODS, INC. (formerly The French
Sardine Company of California),
Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Pursuant to the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby adopts its Statement of Points on Appeal, which was filed in the District Court, as its statement of the points upon which it intends to rely in this Court.

Designation of Record

Pursuant to Rule 17(6) of this Court, appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely on this appeal, and desires to have printed, omitting the title of Court and cause from each of the documents designated for printing:

1. The complete record, certified by the Clerk of the District Court to the Court of Appeals except that there shall be included only the following

of the plaintiff's Exhibits: 1 through 15, 26, 27, 28, 32, and 35.

2. The District Court Clerk's certification of Record on Appeal;

3. Application for Extension of Time to Docket Record on Appeal and Order, filed June 7, 1955;

4. This Designation of Record Necessary for Consideration on Appeal and to be Printed; and

5. Statement of Points Upon Which Appellant Intends to Rely on Appeal. (Court of Appeals)

Dated: This 8th day of July, 1955.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,

Asst. U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated between the parties hereto, through their respective counsel of record, that the following documents, which are material to consid-

eration of the appeal, may be excluded from that portion of the record to be printed; but that, notwithstanding such exclusion from the printed record, said documents may be referred to in the briefs and arguments of either party hereto the same as if said documents had been included in the printed record:

1. Plaintiff - Appellee's Exhibits numbered 16 through 25, inclusive, 29, 30, 31, 33, 34 and 36.

2. This stipulation.

Dated: July 12, 1955.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By STAFFORD R. GRADY,

Attorneys for Appellee
LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,
Asst. U. S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 15, 1955. Paul P. O'Brien,
Clerk.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STAR-KIST FOODS, INC., (formerly the French Sardine
Company of California),

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

H. BRIAN HOLLAND,
Assistant Attorney General,

ELLIS N. SLACK,
ROBERT N. ANDERSON,
CHARLES B. FREEMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
ROBERT H. WYSHAK,
Assistant United States Attorneys,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellant.

FILED

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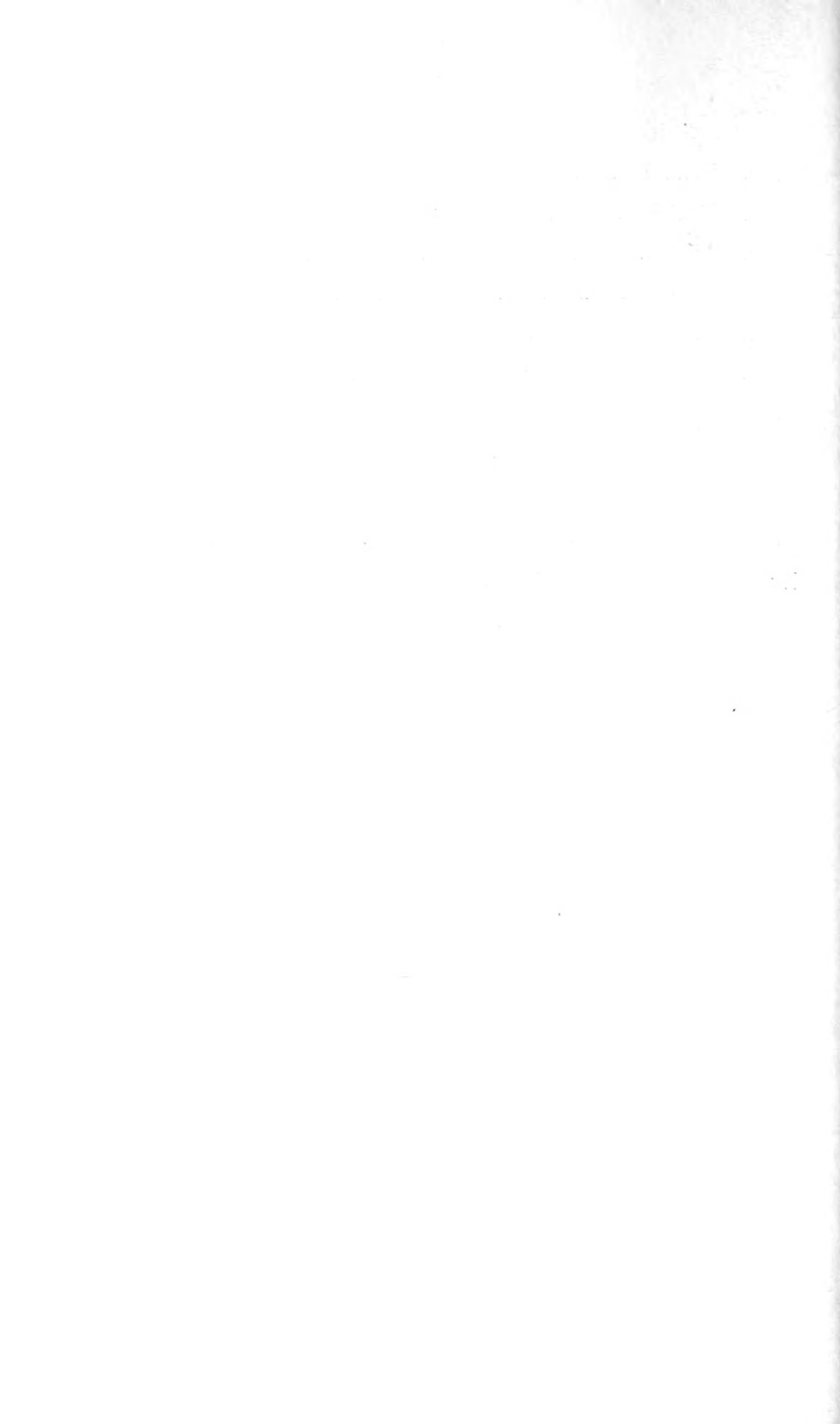
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No. 14794

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STAR-KIST FOODS, INC., (formerly the French Sardine
Company of California),

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

Opinion Below.

The opinion of the District Court [R. 36-49] is not
officially reported.

Jurisdiction.

This appeal involves federal excess profits taxes in the
amount of \$111,359.02, plus interest, for the fiscal year
ended May 31, 1943. Pursuant to an assessment of
deficiency on January 28, 1947 [R. 25], taxpayer paid
additional taxes on July 29, 1948, and filed a claim for
a refund on October 14, 1949. [R. 11-12, 38.] No
action on the claim for refund was taken within six
months, and on February 27, 1952, the taxpayer brought
an action in the District Court for recovery of the taxes
paid. [R. 3-20.] Jurisdiction was conferred on the Dis-

trict Court by 28 U. S. C., Section 1346(a)(1). The District Court entered judgment in favor of the taxpayer on February 3, 1955. [R. 54-55.] Notice of appeal was filed March 30, 1955. [R. 57.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the amount paid by the taxpayer to the Treasurer of the United States in compromise of a treble damage claim by the Office of Price Administration under Section 205(e) of the Emergency Price Control Act of 1942, as amended, is deductible as an ordinary and necessary business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

Statutes and Regulations Involved.

The pertinent statutes and Regulations involved are set forth in the Appendix, *infra*.

Statement.

The findings of fact of the court below, which, in part, the appellant contends are "clearly erroneous," may be summarized as follows:

The taxpayer was incorporated under the laws of the State of California, in November, 1917, as the French Sardine Company of California. In April, 1953, its name was changed to Star-Kist Foods, Inc. Since its incorporation, taxpayer has been engaged in the fish cannery business, having its offices and principal place of business at 181 Fish Harbor Wharf, Terminal Island, Los Angeles, California. It purchases raw fish by the ton from fishermen, cans the fish and sells it to customers (who then resell it to consumers) through brokers. [R. 36-37.]

Taxpayer keeps its books and files its tax returns on the basis of the accrual method of accounting and on the basis of fiscal years ending May 31st. Taxpayer filed its corporation income and declared value excess profits tax return and its excess profits tax return for the fiscal year involved, ended May 31, 1943, with the Collector of Internal Revenue for the Sixth District of California. [R. 37.]

Pursuant to the provisions of the Emergency Price Control Act of 1942, the Administrator of the Office of Price Administration (hereinafter designated O. P. A.), issued a General Maximum Price Regulation (hereinafter designated G. M. P. R.), which fixed the price at which taxpayer could sell its canned tuna at the same price at which it had sold them during the month of March, 1942. Taxpayer had not sold fancy light meat tuna during March, 1942, therefore, under the terms of the G. M. P. R. taxpayer was required to adopt as its ceiling price for that commodity the price which was charged during March, 1942, by its nearest competitor. There was disagreement among taxpayer's officials as to who was its nearest competitor. Despite advice from counsel to the contrary, taxpayer adopted the lowest price in the industry, *i.e.*, \$11 per case on fancy light meat tuna, basis 48 1/2's. This was the price used by Van Camp Sea Food Company. At the time, the highest price was \$14 per case, basis 48 1/2's. This price was used by High Seas Tuna Company of San Diego. [R. 39-40.]

No ceilings were fixed by G. M. P. R. upon the price of raw fish which continued to rise during the year 1942. The widely varying ceiling prices for canned tuna and the lack of a ceiling price for raw fish was recognized in 1942 as inequitable by the officials of O. P. A.

The head of the Fish Section of the O. P. A., Mr. Triggs, proposed to remedy the situation by issuing a regulation fixing the price at which all canners would be required to sell the same product, and also by fixing a ceiling price upon raw fish. [R. 40-41.]

Taxpayer's sales manager, Mr. Williams, kept in constant touch with O. P. A. officials in Washington during the summer and fall of 1942. He made several trips to Washington to confer with Mr. Triggs. Mr. Williams spoke with Mr. Triggs frequently over the telephone and he wrote letters to Mr. Triggs. Mr. Triggs advised Mr. Williams that a new regulation fixing the price at which all canners would be required to sell the same product would be issued momentarily. Mr. Triggs gave Mr. Williams reason to believe that the expected new dollar and cents ceiling price for fancy light meat tuna would be \$12 per case, basis 48 ½'s. [R. 41.]

New ceilings were fixed on several canned fish products during the late summer and fall of 1942, but these did not affect canned tuna. While awaiting the new ceiling on canned tuna, taxpayer accumulated a large inventory. Its cash position became relatively low since its cash expenditures averaged approximately \$235,000 per week during the sardine season months, October through December. [R. 42-43.]

Taxpayer's sales manager, Mr. Williams, again consulted Mr. Triggs, and was advised that the expected new ceiling on tuna would be issued shortly. The sales manager was also advised that Mr. Triggs would support anything taxpayer might do if it was within reason. Upon advice from counsel, taxpayer, beginning with September 24, 1942, invoiced its customers at \$12 per case

of fancy light meat tuna, basis 48 ½'s [R. 43-44] and placed the following notation upon the invoice [R. 44]:

Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/½'s and \$2.00 per case less on 48/1's, and will refund you accordingly.

Taxpayer also sent a mimeographed announcement to all its customers on September 24, 1942, explaining its action. Also, on the same day, taxpayer by letter advised Mr. Triggs of the action taken. [R. 44.]

The new regulation on canned tuna was not issued until January 7, 1943, at which time the ceiling price on fancy light meat tuna, basis 48 ½'s, was fixed at \$12. Thereafter, the Los Angeles enforcement office of the O. P. A. conducted an investigation of taxpayer's sales of canned tuna during the period from September 24, 1942, until the new regulation was issued January 7, 1943. That office determined that taxpayer had overcharged its customers \$97,215 on sales of canned tuna.

After conferences between officials of taxpayer and enforcement officials of the Los Angeles office of the O. P. A., taxpayer's representatives were told that they had violated G. M. P. R. However, in view of the extenuating circumstances, O. P. A. would consider the matter closed if taxpayer would present them with a check in favor of the Treasurer of the United States for the exact amount of the overcharge, as a contribution to the war effort. [R. 44-45.]

The taxpayer made the payment dated May 20, 1943, in the amount of \$97,215 to the Treasurer of the United

States. Taxpayer's officers also signed a waiver of answer and consent judgment in an action to restrain future violations, which action was filed by the O. P. A. in the District Court, Southern District of California, June 3, 1943. [R. 45.]

The action of the Los Angeles enforcement officials of O. P. A. in accepting single damages instead of suing for treble damages was approved in Washington by the then Chief of Enforcement of the Meat and Dairy Products Section of the Food Enforcement Branch of O. P. A. Single damages were accepted because it was considered that taxpayer's violation was inadvertent and not wilful; that taxpayer had acted in good faith and had taken reasonable precautions to comply with the law. [R. 45-46.]

Taxpayer on its tax returns for the taxable year involved, fiscal year ended May 31, 1943, deducted the amount of \$97,215 as an ordinary and necessary business expense. The Commissioner of Internal Revenue disallowed the amount as a deduction and assessed additional taxes against the taxpayer. The additional tax was paid in July, 1948. [R. 11-12, 38.]

Taxpayer's claim for refund was filed in October, 1949, and when no refund was made, taxpayer commenced this suit in February, 1952. [R. 38.]

Statement of Points to Be Urged.

The statement of points which are relied on by the Government as the basis for these proceedings is set forth at pages 61-62 of the printed record. In substance they are that the District Court erred in that certain of its findings of fact and conclusions of law are not supported by and are contrary to the evidence; that the

District Court erred in failing to find that the taxpayer's violation of the Emergency Price Control Act of 1942, and regulations thereunder, was the result of intentional and wilful acts by the taxpayer; that the District Court erred in failing to find that the allowance as a deduction from gross income of the \$97,215 paid by the taxpayer to the Treasurer of the United States as a result of its violation would frustrate the enforcement of the applicable law and regulations and would violate public policy; and that accordingly the District Court erred in entering judgment for the taxpayer.

Summary of Argument.

The amount paid by the taxpayer to the Treasurer of the United States in compromise of a treble damage claim by the O. P. A. under Section 205(e) of the Emergency Price Control Act of 1942, as amended, is not deductible as an ordinary and necessary business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

A. Whether an expense incurred by reason of violating the Emergency Price Control Act is deductible as an ordinary business expense depends upon whether the deduction will frustrate the purposes of the statute or a sharply defined legislative policy. The purposes of the Act are frustrated if a deduction is allowed where the taxpayer has wilfully violated the Act or has failed to take reasonable practicable precautions against the occurrence of the violation.

B. The burden of showing the right to the claimed deduction is on the taxpayer. This burden the taxpayer has failed to meet.

“Wilful,” as used in Section 205(e) of the Emergency Price Control Act, as amended, means knowingly, intentionally and deliberately, as distinguished from accidental or unintentional. No malice or evil intent is necessary. Taxpayer understood the Regulations and knew what the ceiling price was at the time of its overcharge. Taxpayer’s act of overcharging was voluntary, deliberate and intentional. Therefore, taxpayer’s violation of the Act was wilful.

“Practicable precautions” within the meaning of Section 205(e) of the Emergency Price Control Act of 1942, as amended, are the exercise of ordinary reasonable care to avoid commission of a violation. Taxpayer disregarded principles of ordinary care and wilfully violated the Act despite its full knowledge of the applicable ceilings on its products.

The findings of the trial court with respect to wilfulness, the exercise of practicable precautions, and with respect to whether the allowance of the deduction sought would frustrate the purposes of the Act are not supported by the evidence and are clearly erroneous.

C. The “penalty” test of deductibility has been rejected by this Court.

D. The administrative settlement of the claim for treble damages is not conclusive as to the nature of taxpayer’s violation. The administrative determination, if any, of wilfulness or innocence is not binding on this Court since the administrative determination was not the exercise of a judicial or quasi judicial function. Nor was it the legislative intent that the administrative determination should be binding on the courts in a judicial proceeding such as this.

ARGUMENT.

The Amount Paid by the Taxpayer to the Treasurer of the United States in Compromise of a Claim by the O. P. A. Under Section 205(e) of the Emergency Price Control Act of 1942, as Amended, Is Not Deductible as an Ordinary and Necessary Business Expense Under Section 23(a) (1)(A) of the Internal Revenue Code of 1939.

A. The Test for the Deductibility of the Expense Here Incurred Because of a Violation of Law.

Expenses which are incurred because of violating the law are deductible as ordinary and necessary business expenses only if the deduction does not frustrate the purposes of the statute or a sharply defined legislative policy. *Commissioner v. Heininger*, 320 U. S. 467. In that case the Supreme Court stated (pp. 473-474):

The Bureau of Internal Revenue, the Board of Tax Appeals, and the federal courts have from time to time, however, narrowed the generally accepted meaning of the language used in Section 23(a) in order that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular circumstances. * * *

If the respondent's litigation expenses are to be denied deduction, it must be because allowance of the deduction would frustrate the sharply defined policies of 39 U. S. C. Sections 259 and 732 which authorize the Postmaster General to issue fraud orders. * * *

This Court adopted the test established by the *Heininger* case when it stated in *National Brass Works v. Commissioner*, 182 F. 2d 526, 580:

The real reason for denying the deductibility of "penalties" is not that they are characterized as such

but because allowance in many cases would be against public policy. * * *

Study convinces us that, in these circumstances, an expense is ordinary and necessary if commonly experienced in the community, provided that the expenditure does not frustrate the purposes of a statute or violate public policy. * * *

The test, whether a deduction would frustrate purposes of a statute or violate public policy, is well established and has been applied by the courts to cases involving the deduction, as an ordinary and necessary business expense, of payments to the Treasury of the United States by reason of violating a price ceiling established pursuant to the Emergency Price Control Act. *Commissioner v. Pacific Mills*, 207 F. 2d 177 (C. A. 1st); *Jerry Rossman Corp. v. Commissioner*, 175 F. 2d 711 (C. A. 2d); *American Brewery v. United States*, 223 F. 2d 43 (C. A. 4th); *Nemrow Bros., Inc. v. United States*, 125 F. Supp. 604 (Mass.).

Congress clearly established a sharp national policy by enacting the Emergency Price Control Act of 1942. In Section 1 it was stated that the Act was "necessary to the effective prosecution of the present war." Thus, the Act sought to prevent practices resulting from the abnormal market conditions which would disrupt the national economy, and to establish a stabilization of prices, fair wages and cost of production.

Section 205(e) of the Act (Appendix, *infra*) originally provided simply for a treble damage action against the

violator. If the violation was in good faith, no action could be maintained. (Sec. 205(d).) As amended by Section 108(b) of the Stabilization Extension Act of 1944 (Appendix, *infra*), Section 205(e) then provided that the amount of damages "shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation."

In determining what would frustrate the purposes of the Act, when the question is the deductibility of a payment made for violation of the Act, the courts have looked to Section 205(e). *Commissioner v. Pacific Mills, supra*; *Jerry Rossman Corp. v. Commissioner, supra*; *American Brewery v. United States, supra*; *Nemrow Bros., Inc. v. United States, supra*. If a deduction is allowed in diminution of the effect of this section, then the purposes of the Act would be frustrated. Thus, unless the taxpayer shows circumstances incompatible with intentional or negligent violation of the statute, to allow the deduction would frustrate the purposes of the Act. If the overcharge is knowingly and deliberately made, or without reasonable practicable precautions against an overcharge, it is inconsistent with an innocent, unintentional violation.

B. The Findings of the District Court That the Taxpayer's Violation of the Emergency Price Control Act Was Inadvertent and Not Wilful, That Taxpayer Had Taken Reasonable Precautions to Comply With the Law and That the Allowance of the Deduction Would Not Frustrate the Purposes of the Act nor Violate Public Policy Are Clearly Erroneous.

1. BURDEN OF PROOF ON THE TAXPAYER.

The Emergency Price Control Act expressly provided that the violator of the Act was subject to an action for treble damages, except where the taxpayer proved that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. Not only is there clearly imposed upon the taxpayer the burden of proving an unintentional violation, but also the burden of proving that the violation was not the result of a failure to take practicable precautions against the violation. If the burden is sustained, the damages are limited to \$25 or the amount of the overcharges, whichever is greater. "Wilful," as used in Section 205(e) means a voluntary and deliberate act as distinguished from accidental, involuntary or unintentional. The word does not require an evil intent or purpose. *Zimberg v. United States*, 142 F. 2d 133 (C. A. 1st), certiorari denied, 323 U. S. 712; *Connor v. Wheeler*, 77 F. Supp. 875 (W. D. Pa.).

Moreover, it is now a "familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer." *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, 593. See, also, *New Colonial Co. v. Helvering*, 292 U. S. 435, 440; *Deputy v.*

duPont, 308 U. S. 488, 493; *Commissioner v. Jacobson*, 336 U. S. 28, 48-49; *McDonald v. Commissioner*, 323 U. S. 57, 60.

2. THE TAXPAYER HAS NOT ADDUCED ANY EVIDENCE TO ESTABLISH AN INNOCENT AND UNINTENTIONAL VIOLATION AFTER TAKING REASONABLE PRACTICAL PRECAUTION TO PREVENT A VIOLATION.

(a) *Taxpayer Was Guilty of a Wilful Violation of the Act and Regulations.*

Taxpayer has not contended that the regulations were complex and that it lacked comprehension of them. Some cases have had this element to weigh in appraising the violation. See, *e.g.*, *Jerry Rossman Corp. v. Commissioner*, *supra*; *Commissioner v. Pacific Mills*, *supra*. In this case, taxpayer had a complete understanding of the meaning and effect of the controlling regulations. [R. 134-136, 164, 180.] Yet, taxpayer knowingly, deliberately, and disregarding the controlling regulations charged its customers a price for canned tuna in excess of the ceiling price. Not that the lack of comprehension would excuse the violation; it is of no mitigating effect in this case since that element is entirely absent.

As pointed out, at the time of the violation taxpayer knew the ceiling price controlling its sales. [R. 134-136, 157, 180.] The price was set by G. M. P. R., Section 1499.2. (Appendix, *infra*.) In a case such as this one, where a taxpayer had no ceiling price during the critical period, *i.e.*, during the month of March, 1942, the price charged by the nearest competitor during such month was to be chosen. G. M. P. R., Section 1499.2. While taxpayer chose a low ceiling, \$11 [R. 39], such price became its ceiling. [R. 177.] It was not required to choose the lowest price in the industry.

Taxpayer's choice of the lowest price in the industry, although it may have had virtues impertinent to this case, was made after deliberation and contrary to the views of counsel. [R. 39, 114.] Taxpayer elected to ignore the advice of its counsel whose function it was to keep abreast of the law. [R. 131-132.] That taxpayer made a mistake or created a situation in which the equities tear at the heart is unimportant in this case. The District Court recognized taxpayer's inequitable situation. [R. 41.] This Court, however, has very forcibly stated in *National Brass Works v. Commissioner*, 205 F. 2d 104, 106:

But a claim of inequity cannot justify a violation of an order. Taking the law into its own hands would frustrate the policies of the United States in its effort to prevent wartime inflation.

To extricate itself from an unfavorable situation of its own creation, taxpayer attempted to clothe its violation of the law with the indicia of compliance with the law. Taxpayer had withheld its tuna from the market and accumulated a large inventory until the beginning of September, 1942, when the overcharges were made. [R. 42.] Customers were invoiced at \$12, a price above the applicable ceiling. [R. 44.] Taxpayer knew at the time of billing the customers that the \$12 price was \$1 in excess of the applicable ceiling. [R. 134-136, 156.] Taxpayer admits that it knew the ceiling was \$11. [R. 180.] Yet taxpayer intentionally and deliberately continued to invoice its customers at the overceiling price of \$12 from September, 1942, to January, 1943. [R. 146, 150, 156.] Taxpayer intended that each of the customers pay the \$12 price knowing that such price was in excess of the ceiling. [R. 135, 136.] The charges were made while G. M. P. R.

was in effect and taxpayer's ceiling was \$11. [R. 177.] Its course of conduct clearly shows that taxpayer's actions were voluntary and with full knowledge of the law. Therefore, taxpayer intentionally, knowingly and deliberately violated G. M. P. R. at the time of its acts of selling and charging its customers \$12 per case, basis 48 ½'s, from September, 1942, to January, 1943.

In an analogous case, *Batson v. Porter*, 154 F. 2d 566 (C. A. 4th), the court held that taxpayer's violation of the ceiling prices was wilful. There, taxpayer, a wholesaler of meat, sold meats in excess of the ceiling prices established by maximum price regulations. Taxpayer knew that the prices exceeded the ceiling, and notified its customers of the overcharge. However, taxpayer contended that the excess prices charged were necessary in order that it continue its business. In holding the violation wilful, the court stated (p. 568):

It is obvious that the defendant was not authorized to substitute his judgment for that of the administrator and to sell his product to retail dealers above the authorized ceiling price merely because he believed that the retail dealers would absorb the excess and would not in turn violate the regulations in making their retail sales.

The factual differences between the *Batson* case and this case are not sufficient to support a distinction. The contention in the *Batson* case that the charges were necessary in order that that taxpayer continue its business created merely an equity and could not vitiate taxpayer's violation. There were procedures established for seeking an adjustment of the maximum price regulations. Taxpayer in this case, however, has similarly urged its economic position [R. 13, 40, 42-43] and similarly sub-

stituted its judgment for that of the administrator instead of requesting, as we will discuss, *infra*, an adjustment in the ceiling prices in accordance with the established procedures.

On the basis of the undisputed evidence on this case, it is therefore contended that the District Court was clearly in error in failing to find that taxpayer intentionally, knowingly and deliberately charged prices for its canned tuna in excess of the maximum ceiling regulations and thereby wilfully violated the Emergency Price Control Act.

(b) *Taxpayer Did Not Take Practicable Precautions Against the Occurrence of the Violation.*

What taxpayer did to give the appearance of complying with the law and the regulations is of no avail in this case. On its invoices, with the advice of counsel, taxpayer included the following notation [R. 14, 44]:

Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1/2's and \$2.00 per case on 48/1's, and will refund you accordingly.

The notation does not prove taxpayer did not intend to violate the statute. It was always the taxpayer's intention and expectation to be paid \$12 under the invoice. [R. 134-136.] That price was \$1 in excess of taxpayer's ceiling price. The notation was merely one of a series of acts employed by the taxpayer to give its conduct the color of complying with the law. Moreover, the taxpayer did not even adhere to the notation; for it continued to invoice its customers at the overceiling price of \$12 after the October 31st date mentioned therein.

By invoicing in the manner taxpayer did, it intended to violate the price ceiling and was taking a gamble on the results. During the summer and fall, 1942, new regulations set a higher ceiling upon several canned fish products but did not include the type of canned tuna involved. [R. 42.] Taxpayer set October 31, 1942, as the date it was gambling upon for its higher ceiling [R. 14, 44], when, in fact, the new regulations setting a different and higher ceiling price on the type of canned tuna involved were not issued until January 7, 1943. [R. 44.] Taxpayer knowingly and deliberately chose to gamble on the results of its action but having lost the gamble, now contends its acts in violation of the statute were not intentional, but innocent and unintentional after having taken practicable precautions. "Practicable precautions" within the meaning of Section 205(e) are the exercise of ordinary, reasonable care to avoid commission of the violation. *Cobleigh v. Wood*, 172 F. 2d 167 (C. A. 1st), certiorari denied, 337 U. S. 924. To gamble on the issuance of the regulation, or when issued, that it would be retroactive to September, 1942, so as to justify the overcharge, is clearly a lack of reasonable practicable business precaution against violating the Emergency Price Control Act.

The taxpayer's sales manager, Mr. Williams, had conferences with Mr. Triggs, head of the Fish Section, O. P. A., Washington, and wrote several letters to him. The District Court found that Mr. Triggs was sympathetic to taxpayer, recognizing its bad position. [R. 41, 81.] The court also found that Mr. Triggs advised the sales manager that a new regulation was "expected" to set a new ceiling of \$12 on the type of fancy tuna involved and that such regulation "could be expected momentarily."

[R. 41.] However, as a reasonably prudent business man, taxpayer's sales manager knew that the advice given was informal and was not an official opinion. Mr. Triggs only advised taxpayer in a general manner and denied that he authorized taxpayer to charge a price in excess of its ceiling. [R. 84, 85, 87, 159-161.] Furthermore, Mr. Triggs knew that he had no authority to grant taxpayer special permission to charge prices in excess of the ceiling. [R. 159, 177.] Although Mr. Triggs agreed with Mr. Williams that taxpayer's ceiling price was low, Mr. Triggs denied that he authorized an increase in price or that he led Mr. Williams to believe that the overcharge would not be a violation. [R. 159, 172-173, 177-178.] Taxpayer asserts innocence by reason of reliance on the informal advice. This Court, however, has held that the violation was wilful even where taxpayer made formal application for an adjustment in ceiling prices, but without permission anticipated the adjustment and charged excess prices. *Porter v. Crawford & Doherty Foundry Co.*, 154 F. 2d 431, certiorari denied, 329 U. S. 720.

The G. M. P. R. established the method whereby any person aggrieved by the ceiling price could seek relief. Section 1499.19 thereof provides (Appendix, *infra*):

Petitions for amendment. Any person seeking a modification of any provision of this General Maximum Price Regulation, or an adjustment not provided for in Sec. 1499.18 of this General Maximum Price Regulation, may file a petition for amendment in accordance with the provisions of Procedural Regulation No. 1 issued by the Office of Price Administration.

The procedure for seeking adjustment was established by Procedural Regulation No. 1, 7 Fed. Register 971. Tax-

payer chose to ignore the procedures and sought informal advice which it now contends was the exercise of practicable precaution. On the contrary, the practicable course was to seek an adjustment in accordance with the established procedures. If that course had been taken, it may have resulted in official permission to charge the price requested in the application for adjustment. (See O. P. A. policy, *e.g.*, Maximum Price Regulation No. 299, Sec. 1364.652 (Appendix, *infra*); Maximum Price Regulation No. 124, Sec. 1303.253, 7 Fed. Register 3158; Temporary Maximum Price Regulations No. 22, Sec. 1351.805, 7 Fed. Register 7915.) No general adjustable pricing, however, was permitted under the G. M. P. R.

All of taxpayer's maneuvers to give its conduct the color of compliance with the law are not enough to sustain the burden of proving that the violation was not intentional and deliberate, and was after taking reasonable practicable precautions against the occurrence of a violation. As pointed out, the evidence clearly establishes that when overcharges were made, taxpayer knew that its ceiling was \$11. Nevertheless, taxpayer intentionally, knowingly and deliberately charged its customers \$12 which was \$1 in excess of the ceiling price. It is no excuse to intentional and deliberate conduct that taxpayer sought the advice of an official of the O. P. A. in Washington. No official authority or advice was given to justify taxpayer's conduct. The law and regulations were clear at the time of taxpayer's conduct; no unofficial action could change them. Therefore, even if taxpayer relied on an informal and unofficial opinion, it does not excuse taxpayer's intentional violation of the Act, since reliance was not reasonable practicable precaution. Hence, taxpayer's intentional conduct in seeking a price for its canned

tuna in excess of the known ceiling constituted a wilful violation of the Emergency Price Control Act.

As we have noted, Section 205(e) of the Act expressly provides that the amount of damages shall be limited to \$25 or the amount of the overcharge, whichever is greater, but only if the defendant proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of a violation. To allow a deduction when taxpayer has not shown that the violation was neither wilful nor the result of a failure to take practicable precaution against the occurrence of a violation causes a diminution of the effect of the statute. The allowance of the deduction under such circumstances thwarts the accomplishment of the policy of the Act, since the purpose of the reduced penalty was to relieve only innocent violators from the possible severity of the full penalty (treble damages) imposed by the Act. 90 Cong. Record, Part 4, pp. 5375-5384, 5435-5451; 90 Cong. Record, Part 5, pp. 5886-5887. If taxpayer cannot prove its innocence, the requirements of the relief proviso are not met. In such case, therefore, to allow the deduction constitutes a frustration of the purposes of the Act. *George Schaefer & Sons v. Commissioner*, 209 F. 2d 440 (C. A. 2d); *Henry Watterson Hotel Co. v. Commissioner*, 194 F. 2d 539 (C. A. 6th).

In view of the foregoing we respectfully submit that the findings of the District Court that the taxpayer's violation of the Emergency Price Control Act was not wilful, that taxpayer took reasonable precautions to comply with the law and that the allowance of the deduction in question would not frustrate the purpose of the Act nor violate public policy are not supported by the evidence and are clearly erroneous.

C. Whether the Payment Constituted a Penalty Is Not Determinative of the Issue Presented.

The District Court found that the payment by taxpayer of the amount of the overcharge did not constitute a penalty. [R. 46.] Whether the payment constituted a penalty is not determinative in these cases of price violations, therefore, the penalty test does not apply. This Court has expressly rejected the penalty test as it stated in *National Brass Works, supra* (pp. 529-530):

While it would perhaps be convenient to attach a tag or label to civil liability for price violations, to do so by the use of the term "penalty" confuses more than it simplifies. What is considered a penalty differs with circumstances and viewpoints. That a payment was or was not in the nature of a penalty would give no quick or sound answer to deductibility.

* * *

The real reason for denying the deductibility of "penalties" is not that they are characterized as such but because allowance in many cases would be against public policy. * * *

But even if the determination of the nature of the payments were crucial, the payments in price violation cases under Section 205(e) would constitute penalties as this Court also observed in the *National Brass* case, *supra* (p. 530):

However, if we had to decide the nature of damage payments to the government under Section 205(e), we would liken them to penalties for the reasons expressed in *Porter v. Montgomery*, 3 Cir., 1947, 163 F. 2d 211. We doubt that 205(e) was in any respect intended to provide for restitution.

D. Administrative Action Is Neither Conclusive nor Binding as Far as a Resolution of the Issue Here Presented Is Concerned.

The fact that O. P. A. accepted merely the amount of overcharges in settlement of the claim for violation is not conclusive as to the nature of taxpayer's violation. *National Brass Works v. Commissioner*, 205 F. 2d 104 (C. A. 9th). The administrator settled claims for the amount of the overcharges not only in cases of nonwilful violation but also as a matter of policy to avoid litigation. [R. 160, 161.] Both courses are permissible under the Emergency Price Control Act. *National Brass Works, supra*. The administrator is not required by Section 205 (e) to collect treble damages in each case, even if the violation was intentional. Section 205(e) only sets the maximum amount of damages at 3 times the overcharges. *Cobleigh v. Woods*, 172 F. 2d 167 (C. A. 1st), certiorari denied, 337 U. S. 924. Thus, the administrator may settle the claim for less than treble, or even the amount of the overcharges in a case of intentional violation, or less than treble damages may be awarded by the court. See, *e.g.*, *Porter v. Gray*, 158 F. 2d 442 (C. A. 9th); *Sobel Corrugated & Wooden Box Co. v. Fleming*, 165 F. 2d 568 (C. A. 6th), certiorari denied, 334 U. S. 815. Therefore, despite the limiting provision of Section 205(e), the fact that O. P. A. accepted only the amount of the overcharges in settlement of the claim is as consistent with wilfulness as with innocence.

But even assuming, *arguendo*, that the basis of the administrative action in settling the claim for the amount of the overcharges was O. P. A.'s determination that taxpayer's violation was not wilful, such a determination is not binding on this Court as a criterion of the deducti-

bility as a business expense. *Commissioner v. Heininger, supra*. The doctrine of *res judicata* has no application because the administrative action was not judicial in nature but executive. There was no hearing or contest in this case but simply the administrative exercise of a ministerial determination. The administrative action must be judicial in nature for the principles of *res judicata* or collateral estoppel to apply. See, *e.g., Arizona Grocery v. Atchison Ry.*, 284 U. S. 370; *District of Columbia v. Cluss*, 103 U. S. 705.

The jurisdiction of the District Court and this Court in the instant type of case is invoked not to review the correctness of O. P. A.'s administrative determination, but to adjudicate in the first instance the nature of taxpayer's violation. In *George Schaefer & Sons v. Commissioner*, 209 F. 2d 440 (C. A. 2d), the only issue was whether settlement by O. P. A. of an overcharge claim proved that the violation was innocent so that the allowance of a tax deduction for the settlement payment would not frustrate the purpose of the Emergency Price Control Act. The court stated (pp. 441-442):

Had taxpayer been sued by OPA, and had there resulted in that suit a judicial decision that taxpayer had successfully defended under the so-called Chandler Amendment, 50 U. S. C. Appendix, Sec. 925(e)—*i.e.*, that the recoverable amount "shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation"—the result here might have been different. See *Utica Knitting Co. v. Shaughnessy*, D. C., 100 F. Supp. 245. But the mere fact of a settlement cannot be

deemed the same as a judicial determination; nor (for reasons already stated) can it be given the rank of an administrative determination of innocence.

* * *

Furthermore, the Emergency Price Control Act makes no provision for the finality or conclusiveness of a determination by the administrator with respect to the nature of a violation. (Cf. conclusive provisions of these Acts: Sec. 204, Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159 (7 U. S. C. 1952 ed., Sec. 194); Sec. 6(a) and (b), Commodity Exchange Act, c. 369, 42 Stat. 998 (7 U. S. C. 1952 ed., Secs. 8, 9); Secs. 501 and 515, Tariff Act of 1930, c. 497, 46 Stat. 590 (19 U. S. C. 1952 ed., Secs. 1501, 1515); Sec. 5, Federal Trade Commission Act, c. 311, 38 Stat. 717, as amended (15 U. S. C. 1952 ed., Sec. 45).) The administrator is empowered by Section 205(e) to institute an action in the courts for the recovery of damages, if he deems there has been a violation. However, a corollary of that authority is the power to make administrative or executive determinations relative to the violation. Thus, the administrator may prosecute the claim in the courts or settle it as the best interests of the Government dictate. As previously shown, there inheres no incidental effects of *res judicata* in this function of the administrator. Any determination by the administrator without an assertion of the claim in the courts and an adjudication on the merits therein is not an action which under the statute could have a conclusive effect upon the courts. It is therefore apparent that the legislative intent inferred from the statute is that Congress did not intend that an administrative determination with respect to the nature of a violation be binding or

conclusive against the courts in a judicial proceeding such as this.

From the foregoing it is clear that in cases of this type the courts concerned clearly have the jurisdiction to determine on the merits the nature of taxpayer's violation. *Jerry Rossman Corp. v. Commissioner, supra.*

Conclusion.

The decision of the District Court is clearly wrong and therefore should be reversed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a) of the Revenue Act, Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or Business Expenses*.—

(A) *In General*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(26 U. S. C., 1952 ed., Sec. 23.)

Emergency Price Control Act of 1942, c. 26, 56 Stat. 23:

SEC. 205 * * *

* * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a

maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

* * * * *

(50 U. S. C. Appendix, 1940 ed., Supp. III, Sec. 925.)

Stabilization Extension Act of 1944, c. 325, 58 Stat. 632:

SEC. 108. * * *

* * * * *

(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

“(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney’s fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word ‘overcharge’ shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this sub-

section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.”

(c) The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

* * * * *

(50 U. S. C. Appendix, 1940 ed., Supp. IV, Sec. 925.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(a)-1. *Business Expenses*.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under sections 23(b) and 23(z), inclusive, and the regulations thereunder. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. * * *

General Maximum Price Regulation, 17 Fed. Register 3153:

Sec. 1499.1 *Prohibition against dealing in commodities or services above maximum prices*. On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No *person* shall *sell* or supply any *service, commodity*, and no person shall sell or supply any at a price higher than the maximum price permitted by this General Maximum Price Regulation; and

(b) No person in the course of trade or business shall buy or receive any commodity or service at a price higher than the maximum price permitted by this General Maximum Price Regulation.

Sec. 1499.2 *Maximum prices for commodities and services; General provisions.* Except as otherwise provided in this General Maximum Price Regulation, the *seller's* maximum price for any commodity or service shall be:

(a) *In those cases in which the seller dealt in the same or similar commodities or services during March 1942:*

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or

(b) *In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:*

The highest price charged during such month by the most closely competitive seller of the same class—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

* * * * *

Sec. 1499.4 *Supplemental regulations.* If the maximum prices established for any commodity under the provisions of this General Maximum Price Regulation fail equitably to distribute returns from the sale at retail of such commodity among producers,

manufacturers, wholesalers and retailers, the Price Administrator will by supplementary regulation establish such maximum prices for different classes of sellers, or fix such base periods for the determination of their maximum prices, as will insure that each such class of sellers shall receive a fair share of such return.

* * * * *

Sec. 1499.17 *Penalties.* Persons violating any provision of this General Maximum Price Regulation are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price Control Act of 1942, and proceedings for the suspension of licenses.

* * * * *

Sec. 1499.19 *Petitions for amendment.* Any person seeking a modification of any provision of this General Maximum Price Regulation, or an adjustment not provided for in Sec. 1499.18 of this General Maximum Price Regulation, may file a petition for amendment in accordance with the provisions of Procedural Regulation No. 1 issued by the Office of Price Administration.

* * * * *

Sec. 1499.21 *Effect of other price regulations.* This General Maximum Price Regulation shall not apply to any sale or delivery for which a maximum price is in effect, at the time of such sale or delivery, under the provisions of any other price regulation issued, or which may be issued, by the Office of Price Administration.

Sec. 1499.22 *Applicability*. The provisions of this General Maximum Price Regulation shall be applicable to the United States, its territories and possessions, and the District of Columbia.

Sec. 1499.23 *Effective date*. All the provisions of this General Maximum Price Regulation shall become effective on May 11, 1942, except that:

(a) The provisions of this General Maximum Price Regulation, other than Sec. 1499.11(a), shall not apply to establishments selling at retail until May 18, 1942;

(b) The provisions of Secs. 1499.1 and 1499.2 shall not apply to any sale of services at retail until July 1, 1942; and

(c) The provisions of Sec. 1499.11(a) shall become effective upon the date of issuance of this General Maximum Price Regulation.

Maximum Price Regulation No. 299, 8 Fed. Register 364:

Sec. 1364.651. *Prohibition against dealing in tuna, bonito, and yellowtail at prices above the maximum*. On or after January 13, 1943, regardless of any contract, agreement or other obligation, no canner, or agent or other person acting on behalf, or under control, of such canner shall sell or deliver any tuna, bonito, or yellowtail, and no person in the course of trade or business shall buy or receive from a canner any tuna, bonito, or yellowtail at prices higher than those set forth in Appendix A hereof, incorporated herein as Sec. 1364.662; and no person shall agree, offer, solicit, or attempt to do any of the foregoing.

The provisions of this section shall not be applicable to sales or deliveries of tuna, bonito, and yellowtail to a purchaser if prior to January 13, 1943, such tuna, bonito, or yellowtail has been received by a carrier, other than a carrier owned or controlled by the seller, for shipment to such purchaser.

Sec. 1364.652. *Conditional agreement.* No canner of tuna, bonito, or yellowtail shall enter into an agreement permitting the adjustment of the prices to prices which may be higher than the maximum prices provided by Sec. 1364.662 in the event that this Maximum Price Regulation No. 299 is amended or is determined by a court to be invalid or upon any other contingency: Provided, That if a petition for amendment has been duly filed, and such petition requires extensive consideration, the Administrator may grant an exception from the provisions of this section permitting the making of contracts adjustable upon the granting of the petition for amendment.

Sec. 1364.655. *Evasion.* The price limitations set forth in this Maximum Price Regulation No. 299 shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase, or receipt of, or relating to tuna, bonito or yellowtail, alone or in conjunction with any other commodity, or by way of any commission, service, transportation, or other charge, or discount, premium, or other privilege, or by tying-agreement or other trade understanding, or by changing the selection or style of processing or the canning, wrapping or packaging of tuna, bonito or yellowtail.

Sec. 1364.657. *Enforcement.* (a) Persons violating any provision of this Maximum Price Regulation No. 299 are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price Control Act of 1942, as amended.

* * * * *

Sec. 1364.658. *Petition for amendment.* Any person seeking an amendment of any provision of this Regulation No. 299 may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1 issued by the Office of Price Administration.

Sec. 1364.661. *Effective date.* This Maximum Price Regulation No. 299 (Secs. 1364.651 to 1364.662, inclusive) shall become effective January 13, 1943.

Sec. 1364.662. *Appendix A: Maximum canner's prices for Tuna, Bonito, and Yellowtail.* (a) The prices set forth below are maximum prices per case f. o. b. car at the shipping point nearest cannery. The maximum prices are gross prices and the seller shall deduct therefrom his customary allowances, discounts, and differentials to purchasers of different classes.

Style of container and
price per case

Variety	1 lb. Tuna	½ lb. Tuna	¼ lb. Tuna
Albacore:			
Fancy	\$31.00	\$16.00	\$9.00
Standard	27.00	14.00	8.00
Grated	25.00	13.00	7.50
Flake	25.00	13.00	7.50
Light Meat:			
Fancy	23.00	12.00	7.00
Standard	21.00	11.00	6.50
Grated	19.70	10.35	6.20
Flake	19.00	10.00	6.00
Bonito:			
Standard	17.00	9.00	5.50
Flake	15.00	8.00	5.00
Yellowtail:			
Standard	16.00	8.50	5.25
Flake	14.00	7.50	4.75

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STAR-KIST FOODS, INC. (formerly The French Sardine
Company of California),

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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FILED

NOV 25 1955

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No. 14794

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STAR-KIST FOODS, INC. (formerly The French Sardine
Company of California),

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion of the District Court is not officially reported. However, the District Court's oral opinion from the Bench at the conclusion of trial is at pages 187-197 of the printed Record, and its findings of fact and conclusions of law are therein at pages 36-49.

Jurisdiction.

Appellee adopts the statement of jurisdiction contained in the Brief for the Appellant.

Question Presented.

Whether the District Court was “clearly erroneous” when it found and held that, upon the facts of this case, Appellee should be allowed a deduction, for federal tax purposes as an ordinary and necessary business expense, for an amount (single damages) it paid the Treasurer of the United States in settlement of an alleged OPA price violation, such violation being made under circumstances inconsistent with an intent to violate the law and inconsistent with a lack of due care to conform to the law.

Statutes and Regulations Involved.

The pertinent statutes and regulations involved are set forth in the Appendix, *infra*.

Statement.

The pertinent facts, as found by the District Court, and which Appellee contends are abundantly supported by uncontradicted evidence, may be summarized as follows:

Appellee was incorporated under the laws of the State of California in November, 1917, as The French Sardine Company of California. [R. 24, 36.] In April, 1953, its name was changed to Star-Kist Foods, Inc. [R. 36.] Since its incorporation Appellee has been engaged in the fish cannery business, its principal products being canned sardines, mackerel and tuna. [R. 36.] Appellee purchases raw fish by the ton from fishermen, cans the fish and sells it to customers (who then resell it to consumers) through brokers. [R. 37.]

Appellee's principal place of business is at Terminal Island, Los Angeles, California. [R. 24, 37.] It keeps

its books and files its tax returns on the basis of the accrual method of accounting and on the basis of fiscal years ending May 31. [R. 24, 37.]

Appellee paid the Treasurer of the United States the amount of \$97,215.00 on May 20, 1943, as the exact amount of certain alleged overcharges on the sale of its canned tuna, *i.e.*, single damages in settlement of claims made against Appellee by the Office of Price Administration. [R. 37-38.] Appellee deducted said amount on its federal tax returns for the fiscal year ended May 31, 1943, and the Commissioner of Internal Revenue denied the deduction claiming that said amount does not constitute a deductible ordinary and necessary business expense. [R. 38.] Appellee filed timely and valid federal corporation returns for the fiscal year ending May 31, 1943; subsequently paid an additional assessment, filed a timely and valid claim for refund of taxes alleged to have been overpaid; and, in the manner and within the time provided by law, filed the instant action for refund of taxes and interest in the United States District Court. [R. 25-26, 37-38.]

The payment of \$97,215.00 grew out of the following circumstances: The Emergency Price Control Act of 1942 was approved on January 30, 1942, and pursuant thereto, the Administrator of the Office of Price Administration (frequently hereinafter referred to as OPA) issued the General Maximum Price Regulation (frequently hereinafter referred to as GMPR).^{*} This regulation

^{*}Ex. No. 16. Pursuant to Stipulation of Counsel certain exhibits have been excluded from the printed record, but “* * * may be referred to in the briefs and arguments of either party hereto the same as if said documents had been included in the printed record.” [R. 244-245.]

fixed the price at which the Appellee could sell its products at the same price at which it had sold them during the month of March, 1942. [R. 39.]

Appellee had not sold fancy light meat tuna during March, 1942, and it was, therefore, required, under the terms of GMPR, to adopt as its ceiling price for that commodity, the price which was charged during March, 1942, by its nearest competitor. [R. 39.] There was some dispute and confusion among Appellee's officials as to who was its nearest competitor. [R. 39, 111, 114.] A. T. Williams, Appellee's sales manager, chose Van Camp Sea Food Company, out of an abundance of caution; because Van Camp had the lowest price in the industry, *i.e.*, \$11.00 per case on fancy light meat tuna, basis 48/½'s. [R. 39, 111.] Appellee's legal counsel, John Morris, Esq., was consulted about the choice of Van Camp as Appellee's nearest competitor, and he advised that other canners were more closely comparable with Appellee than was Van Camp, and that the ceilings of these other canners, which ceilings were higher than Van Camp's, should be taken as Appellee's ceilings. [R. 39, 111, 114.] Notwithstanding this advice, Appellee, accepted the lowest ceiling price in the industry as its own. Other canners had ceiling prices on this same product several dollars higher. [R. 40, 92, see "Statement of Considerations," p. 7 of Ex. 24, MPR 299.] For instance, High Seas Tuna Company, of San Diego, which was controlled by the same individual (Martin J. Bogdanovich) who (as its president) controlled Appellee, had a ceiling price of \$14.00 per case on fancy light meat tuna, basis 48/½'s. [R. 40, 91.]

No ceilings were fixed upon the price of raw fish by GMPR. [R. 40, Ex. 16.] As a result, prices which

canners had to pay for their raw material—fresh fish—rose rapidly. [R. 40.] This was true in many kinds of fish, including tuna. For instance, by the end of 1941, yellowfin (tuna) was bringing \$130.00 per ton. Early in 1942, the price jumped to \$160.00 and by the end of the season the price had advanced to \$190.00. Including bonuses paid fishermen, the 1942 year ended with an average price of \$200.00 per ton. This situation was recognized and reflected in the Statement of Considerations issued by the Administrator of OPA when the price of fresh tuna was finally fixed by Regulation No. 366 issued on April 13, 1943. [R. 40; p. 4 of Ex. 25.]

Appellee was caught in an economic bind. It was required to sell its canned fancy light meat tuna for \$11.00 per case, the lowest price in the industry; but it was simultaneously required to pay rapidly rising prices in order to procure raw fish. [R. 40.]

This situation, *i.e.*, the widely varying ceiling prices which various canners had upon the same product under GMPR, together with the fact that the price of raw fish was not fixed, and constantly rising, was recognized in the summer of 1942 as an inequitable one by the officials of the OPA, including Charles W. Triggs, who was then the head of the Fish Section of the Office of Price Administration in Washington. Triggs proposed to remedy this situation by issuing a regulation fixing, at a definite dollar and cents figure, the price at which all canners would be required to sell the same product, and also by fixing the price which fisherman could charge for the raw fish. [R. 41, 165-167.]

For the purpose of obtaining some relief from this inequitable situation, Appellee's sales manager, Williams, was in constant touch with OPA officials in Washington

during the Summer and Fall of 1942. He made several trips to Washington to confer with Triggs concerning the matter; he spoke with Triggs frequently over the long distance telephone; and he wrote Triggs. Triggs was of the firm belief that Appellee was in a bad position and advised Williams that a new regulation, which would give Appellee relief, could be expected momentarily; and gave Williams reason to believe that the expected new dollar and cents ceiling price for fancy light meat tuna would be \$12.00 per case, basis 48/½'s. [R. 41.]

New dollar and cents ceiling prices were fixed on several canned fish products during the late Summer and Fall of 1942, by issuance of the following regulations:

Regulation No.	Date	Product
184	July 23, 1942	Maine Sardines
209	Aug. 31, 1942	California Sardines
247	Oct. 24, 1942	Domestic Canned Crab Meat
252	Oct. 30, 1942	Vinegar Cured Herring
265	Nov. 9, 1942	Salmon
277	Nov. 28, 1942	Mackerel

The ceiling prices fixed by these regulations were higher than the lowest ceilings under GMPR. For instance, Regulation No. 209, effective August 31, 1942, fixed the prices at which Appellee was entitled to sell its sardines at figures which averaged 20.9% higher than the ceiling price which Appellee had had under GMPR. [R. 42, 144.]

While awaiting the new anticipated dollar and cents ceiling on canned tuna, Appellee accumulated a rather large inventory with a value of over a half million dollars. [R. 42.] During the last week in August and the first three weeks of September, 1942, Appellee shipped about 40 carloads of canned tuna without invoicing it. [R. 42.] Toward the end of September, Appellee's cash

position became relatively low. Whereas Appellee's cash expenditures averaged approximately \$235,000.00 per week during the sardine season months of October through December, 1942, Appellee had on hand cash in the amount of \$144,919.07 as of September 24, 1942; *i.e.*, less than a week's supply to pay plant payroll, trade accounts, fishermen accounts and other cash requirements. [R. 42; Ex. 33.]

Faced with this situation, Williams consulted Triggs and was advised that the expected dollar and cents ceiling on tuna would be issued shortly; that inasmuch as OPA was allowing increased prices on other canned fish, Appellee would not be taking any chances by raising its price; that he (Triggs) would support anything Appellee might do within reason. [R. 42, 158-159.] Appellee's legal counsel, John Morris, was consulted concerning what steps Appellee might take. He advised that tuna might be both canned and sold through the High Seas Tuna Packing Company in San Diego at a \$14.00 per case ceiling, since both Appellee and High Seas were controlled by the same individual, Martin J. Bogdanovich. However, Mr. Bogdanovich decided against this course, because he did not want to profiteer because of the war. [R. 43, 114-116.] Morris also considered the following matters: The admittedly inequitable situation in which Appellee found itself with the lowest ceiling in the industry under GMPR; the possibility that Appellee's ceiling was really not \$11.00 a case on fancy light meat tuna because of his opinion that Van Camp was not Appellee's nearest competitor; the pronouncements from governmental officials in Washington, and particularly one by Secretary Wickard that inequities under GMPR would be corrected as rapidly as possible, but that nothing in it should retard production; and the assurances from Triggs;

and, based upon these considerations and others, Morris advised Appellee that in his opinion it would be proper to invoice Appellee's customers, at \$12.00 per case of fancy light meat tuna, basis 48/½'s, and place the following notation upon the invoice:

"Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/½'s and \$2.00 per case less on 48/1's, and will refund you accordingly." [R. 43-44, 120-121; Ex. 32, R. 233.]

In accordance with this advice Appellee, on and after September 24, 1942, invoiced its customers with the notation indicated above. Appellee also sent a mimeographed announcement to all of its customers on September 24, 1942, explaining its action. [R. 44; Ex. 35, R. 234-242.] On the same day Appellee by letter advised Triggs of the action taken. [R. 44; Ex. 5, R. 205.]

Due to delays in the Washington office of OPA, the expected regulation fixing a dollar and cents price on canned tuna was not issued until January 7, 1943. [R. 44.] On that date, by Regulation No. 299, the OPA fixed the ceiling price on fancy light meat tuna at \$12.00 per case, basis 48/½'s, *i.e.*, at exactly the price at which Appellee had invoiced its customers. [R. 44; Ex. 24.]

Thereafter, the local (Los Angeles) enforcement office of the OPA conducted an investigation of Appellee's sales of canned tuna during the period from September 24, 1942, until the new regulation was issued in January, 1943, and determined that Appellee had overcharged its customers \$97,215.00 on sales of canned tuna. Con-

ferences were had between officials of Appellee and enforcement officials of the Los Angeles office of the OPA. Appellee's representatives were told that they had violated GMPR, although they did not violate the intent or purpose of the Act; that in view of the extenuating circumstances, the OPA would consider the matter closed if Appellee would present them (the OPA enforcement officials) with a check in favor of the Treasurer of the United States for the exact amount of the overcharge, as a contribution to the war effort. Appellee thereupon made the payment, dated May 20, 1943, in the amount of \$97,215.00 to the Treasurer of the United States. Appellee's officers also signed a waiver of answer and consent judgment in an action to restrain future violations, which action was thereafter, on June 3, 1943, filed by the OPA, in the United States District Court against Appellee. [R. 45; Exs. 26, 27, 28, R. 227-232.]

The action of the Los Angeles enforcement officials of OPA in accepting single damages, instead of suing Appellee for treble damages, was approved in the Washington office of OPA by Herman A. Greenberg, who was then Chief of Enforcement of the Meat and Dairy Products Section of the Food Enforcement Branch of OPA, after investigation, including a review of the correspondence between Appellee and Triggs, and a conference with Triggs in Washington. Single damages were accepted because it was considered that Appellee's violation was inadvertent and not willful; that Appellee had acted in good faith and had taken reasonable precautions to comply with the law. [R. 45-46, 77-78.]

The payment by Appellee to the Treasurer of the United States in the amount of \$97,215.00 on May 20, 1943, was made in circumstances which are inconsistent

with an intention to violate the Emergency Price Control Act of 1942 and the Regulations issued thereunder, and inconsistent with a lack of due care to conform to the law and regulations; Appellee acted in good faith and took reasonable precautions to avoid violating the law and regulations; the payment was a method of preventing unjust enrichment by Appellee as a result of the overcharge, and it did not constitute a penalty; and allowance of said payment as a deduction would not frustrate enforcement of the applicable law or regulations and would not violate public policy. [R. 46.] Appellee is entitled to deduct the amount of \$97,215.00 as an ordinary and necessary business expense for the fiscal year ended May 31, 1943. [R. 46.]

Summary of Argument.

An amount paid the United States in settlement of a claim by the OPA on account of alleged overcharges is deductible as an ordinary and necessary business expense provided the alleged violation is made under circumstances which are inconsistent with an intent to violate the law and inconsistent with a lack of due care to conform to the law; allowance of a deduction in such circumstances will not frustrate the purposes of the Emergency Price Control Act of 1942.

The District Court's findings and conclusions that the alleged violation in the instant case was made under such circumstances is abundantly supported by substantial uncontradicted evidence, and they are not clearly erroneous. The OPA Administrator's acceptance of single damages, *i.e.*, merely the amount of the overcharge, is positive and compelling evidence that to allow the deduction will not frustrate the policies of the Act.

ARGUMENT.

I.

An Amount Paid to the United States in Settlement of a Claim by the OPA on Account of Alleged Overcharges Is Deductible as an Ordinary and Necessary Business Expense Provided the Alleged Violation Is Made Under Circumstances Which Are Inconsistent With an Intent to Violate the Law and Inconsistent With a Lack of Due Care to Conform to the Law.

Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798), which is the provision applicable to the fiscal year of Appellee ended May 31, 1943, provides in part that:

“SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *

The question of whether amounts paid to the United States, in settlement of claims or actions by the OPA for alleged overcharges, constitute deductible ordinary and necessary business expenses, is one which has been the subject of considerable litigation. Neither the Emergency Price Control Act of 1942, nor the Internal Revenue Code contains a specific provision either allowing or disallowing such payments as deductions. The law has been developed by decisions of the Courts in cases cover-

ing a variety of situations, and there are now certain guide posts for determining deductibility.

Early History.

As originally enacted, Section 205(e) of the Emergency Price Control Act of 1942 (50 U. S. C. App., Sec. 925(e) (1954) 56 Stat. 23, 33) provided that if a sale violated a maximum price regulation, and was “* * * for use or consumption * * *” in “* * * the course of trade or business, * * *” the Administrator could bring an action on behalf of the United States for treble damages, *i.e.*, three times the amount of the overcharge. No mention was made of single damages, *i.e.*, the exact amount of the overcharge. However, the Administrator developed a firm policy which came to be stated in Section 9.1601 of the OPA Manual.

That policy was also expressed in a letter written on April 1, 1944, by the then Administrator, Chester Bowles, to the Senate Banking and Currency Committee. He wrote “* * * that the protection of innocent violators from excessive damages * * *” was “* * * obviously desirable * * *”; and that it had been his “* * * *policy to adjust cases involving innocent violations by payment of merely the amount of the overcharge.* Congress gave the Administrator discretion to decide into [sic] what cases treble damage actions should be brought. That discretion has been exercised and will in the future be exercised to avoid undue hardship in deserving cases.” (Emphasis supplied.) Hearings before the Senate and Banking Committee on S. 1764, 78th Cong., 2d Sess. 1415, 1417 (1944). Thus the Administrator expressed a sharply defined policy on overcharges. This policy distinguished between innocent good faith overcharges on

the one hand, and overcharges which were willful or the result of the violator's failure to take practical precautions to avoid violating the law. But whether the violation was in good faith or bad faith, the Administrator required the violator to surrender at least the overcharge itself. The payment of merely the overcharge was something quite different from the infliction of a penalty. By obtaining the overcharge, the Administrator made certain that the seller was not unjustly enriched to the disadvantage of his competitors. The policy of the Administrator illuminates the policy of Congress, for "Congress showed in 1944 by the amendment of Section 205(e) that it agreed with the Administrator." *Jerry Rossman Corporation v. Commissioner*, 175 F. 2d 711, 714 (C. C. A. 2, 1949).

Like the Administrator, Congress carefully discriminated between the violation which was innocent or inadvertent and the violation which was careless or willful, when the law was amended in 1944. In the amending law (S. 1764) as reported out by the Senate Committee on Banking and Currency, courts would have been authorized to award one and one-half times the amount of the overcharge "where violations occurred unintentionally and despite the exercise of due diligence to prevent them." Sen. Rep. No. 922, 78th Cong., 2nd Sess. 13-14 (1944). This Senate Bill and a companion House Bill (H. R. 494, 78th Cong., 2nd Sess. (1944)) were drastically revised on the floor after the extensive debates. Hence those debates, rather than the committee reports, articulate the relevant policy which Congress translated into law. These debates resulted in the provision in the law which came to be commonly known as the "Chandler De-

fense,"¹ which provided that "if the defendant [the violator] proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practical precautions against the occurrence of the violation," the violator need pay merely the amount of the overcharge. Stabilization Extension Act of 1944, Sec. 108, C. 325, 58 Stat. 632, 50 U. S. C. App. 1940 ed., Supp. IV, Sec. 925. Thus the 50% "penalty" provision in the bill as reported out by the Senate Committee, was eliminated from the law as passed by Congress.

Notwithstanding the clearly expressed policy of Congress not to penalize the non-willful violator, the Bureau of Internal Revenue, early in 1943, adopted a ruling which provided that amounts paid in satisfaction of judgments obtained in suits brought by the Price Administrator under Section 205(e) of the Emergency Price Control Act of 1942 (56 Stat., 23), for the violation of a regulation, order or price schedule prescribing a maximum price or maximum prices and amounts paid to the United States in compromise of pending or contemplated litigation—

¹In discussing the Chandler Defense, Congressman Goodwin described it as follows:

"This amendment does not protect the wilful violation of the regulations or the man who fails to take reasonable precautions, and that man deserves no protection. It does seek to protect the merchant who, in good faith, does all he reasonably can to cooperate and he ought to be protected."

"The amendment leaves this bill thoroughly effective against the dishonest merchant and the chisler, but protects the honest merchant from being penalized for an honest mistake." (90 Cong. Reg. at 5886.)

Similarly Congressman Gwynne stated:

"In other words, if he could show that he had cooperated honestly, then he would be excused from the penalty but would be required to pay the overcharge." (90 Cong. Reg. at 5887.)

tion in such cases were not deductible from gross income for Federal income tax purposes. I. T. 3627 (1943), C. B. 111. No differentiation was made in this ruling between the innocent and the willful violator.

In several of the early cases, the Tax Court of the United States disallowed such payments as ordinary and necessary business expenses, frequently on the theory that such payments constituted penalties for violating the law; that allowing deductibility of the penalty would mitigate the penalty and hence be contrary to public policy. Thus in *Scioto Provision Company*, 9 T. C. 439 (1947), the Court disallowed the deduction of \$7,709 paid to the OPA in settlement of a claim for treble damages on account of alleged over-ceiling sales of meat products. Similarly, in *Garibaldi & Cuneo*, 9 T. C. 446 (1947), the Tax Court again disallowed a payment (one and one-half times the overcharges) to OPA as a deduction.

Then came the Tax Court's decision in what ultimately became one of the leading cases in this field, namely, *Jerry Rossman Corporation*, 10 T. C. 468 (1948). In that case, a converter of rayon and cotton fabrics found that due to the fact that actual shrinkage had been less than the tolerance allowable, it had, over the course of nearly a year, made overcharges amounting to slightly in excess of \$3,000 on net sales of over \$1,680,000. Upon discovering this fact, the taxpayer made a voluntary disclosure to OPA and paid the amount of the overcharge. The Tax Court (with seven Judges dissenting) disallowed the deduction. The case was appealed to and ultimately reversed by the Second Circuit. However, before the Second Circuit Court's decision was handed down, the Tax Court decided the additional cases of

Nazareth Mills, Inc., 8 T. C. M. 164 (1949); *New Orleans Motor Company, Inc.*, 8 T. C. M. 643 (1949); and *National Brass Works, Inc.*, 8 T. C. M. 286 (1949) (reversed and remanded, 182 F. 2d 526 (C. C. A. 9, 1950)), all on the authority of its own prior decisions discussed above. The *National Brass* case was appealed, and this Court's opinion, 182 F. 2d 526, has been a landmark case on this subject.

Rossman and National Brass Cases and Subsequent Developments.

The circuit courts reversed the Tax Court in both the *Jerry Rossman* and *National Brass Works* cases. In *Jerry Rossman*, the Second Circuit, 175 F. 2d 711 (C. C. A. 2, 1949) in an opinion written by Judge Learned Hand, held that:

(1) Payment of an overcharge—at least to the extent of single damages as distinguished from treble damages—is not a “penalty” whether paid to the purchaser or to the OPA.

(2) Even assuming such a payment is a penalty, not all penalties are nondeductible. Deduction is denied only when allowance of the deduction would frustrate sharply defined public policies.

(3) Acceptance by OPA of single damages is “positive and compelling” evidence that the Administrator himself, felt that the taxpayer had acted in good faith and had taken practicable precautions to avoid violation, and his action, standing alone, should be accepted as suffi-

cient evidence that allowance of the deduction would not “frustrate” any “sharply defined” policies of the Emergency Price Control Act of 1942.

Next came this Court’s reversal of the Tax Court’s decision in the *National Brass Works* case, 182 F. 2d 526 (1950). The Tax Court had disallowed a deduction for an amount paid to the OPA in compromise of an admitted price violation in the sale of certain non-ferrous castings. These violations had been discovered by OPA investigators. This Court reversed and remanded,² for further proceedings in conformity with its opinion (part of which is quoted at the end of this section) that courts must look beyond the mere payment to the circumstances which gave rise to the violation in an effort to determine whether it was willful, resulting in non-deductibility or non-willful, resulting in allowance of the deduction.

The rules of law announced in the *Jerry Rossman* and *National Brass* cases, *i.e.*, of allowing a deduction where it appears that the violation was made under circumstances which are inconsistent with an intent to violate

²On remand, the Tax Court held a further hearing and found that the price regulation involved required taxpayer to reduce its price 1½¢ per pound; that it had consulted its own counsel, who advised that prices should be so reduced; and that in disregard of its own counsel’s advice taxpayer “* * * purposely, deliberately, and knowingly failed to comply with the price regulation.” 16 T. C. 1055. The court held that to allow the deduction in these circumstances would frustrate the Price Control Act and hence disallow it. On a second appeal, this Court held that in view of the evidence adduced on remand, the Tax Court’s second decision was not clearly erroneous, and affirmed it. *National Brass Works, Inc. v. Commissioner of Internal Revenue*, 205 F. 2d 104 (1953).

the law and inconsistent with a lack of due care to conform to the law, have been followed by all of the cases decided since.^{2a} Thus the First³ and Fourth⁴ Circuit Courts have allowed deductions in two fairly recent cases. The Tax Court,⁵ several United States District Courts⁶ and

^{2a}Appellee does not mean to imply that all subsequent cases have allowed deductions. There have been some notable exceptions, such as the following: *Henry Watterson Hotel Co.*, 15 T. C. 902 (1950), affirmed 194 F. 2d 539, C.C.A. 6 (1952), where taxpayer “* * * offered no explanations whatsoever as to the reasons for the overcharges. * * *” 15 T. C. at 906; *Walter Norwood Estate*, 11 T. C. M. 524 (1952), where the overcharges for hotel rooms were made in direct violation of a preliminary injunction issued by the United States District Court and no testimony was offered as to the cause of the overcharges; *Almor Dress Co., Inc.*, 11 T. C. M. 957 (1952), where the taxpayer continued to violate the regulations after an injunction had been entered against it; *Judian Lentin*, 23 T. C. 112 (1954), where the United States District Court had made a prior (to the Tax Court case) judicial determination (in the O. P. A. suit) that the violation for which the payment was made was willful; *Hull Senator Co.*, 13 T. C. M. 1005 (1954), where the taxpayer paid in settlement one and one-half times the amount of the overcharges; and *Nemrow Bros. Inc. v. United States of America*, 125 F. Supp. 604, D. C. Mass. (1954), where the taxpayer had paid treble damages and its attitude was so flagrant that the O. P. A. recommended suspension of its right to deal in rationed sugar for a period of three months.

³*Commissioner v. Pacific Mills*, 207 F. 2d 177, C. C. A. 1 (1953), affirming the Tax Court's decision, 17 T. C. 705 (1951). The Commissioner's original non-acquiescence in the Tax Court's decision has been withdrawn, and acquiescence indicated. 1954-12 I. R. B. 3.

⁴*American Brewery, Inc. v. United States of America*, 223 F. 2d 43, C. C. A. 4 (1955).

⁵*Philip E. Ludwig*, 13 T. C. M. 471 (1954); *Klinck*, 11 T. C. M. 1224 (1952); *Michael Markovits*, 11 T. C. 823 (1952); *Albert C. Drucker*, 11 T. C. M. 680 (1952); *Paris Mfg. Co.*, 10 T. C. M. 1064 (1951), Government's appeal to C. C. A. 1 dismissed (*nolle pros*), April 14, 1952; and *Farmer's Creamery Co. v. Fredericksburg, Va.*, 14 T. C. 879 (1950), and the Commissioner has indicated his acquiescence in the O. P. A. deduction portion of the decision. 1954-20 I. R. B. 4.

⁶*Marantz v. Yoke*, 113 F. Supp. 536, D. C. N. D. W. Va. (1953); *Stinson & Dickensheets, Inc. v. United States*, D.C. NJ.,

the United States Court of Claims⁷ have also allowed deductions in a number of cases involving a variety of factual situations.

So compelling has been the effect of the *Rossman* and *National Brass* decisions, and those which have followed, that the Commissioner of Internal Revenue himself has relented from his prior ruling discussed above and adopted the rationale of the Courts. Thus, during 1954 he issued a new ruling on this subject, modifying his prior 1943 ruling, which new ruling provides in part as follows:

“Upon reconsideration of this question, in the light of the above-cited courts decisions, it is held that payments made to the United States for violation of the Emergency Price Control Act of 1942, 56 Stat. 23, 34, Office of Price Administration regulations, orders, or price schedules, are deductible as business expenses, under section 23(a)(1)(A) of the Internal Revenue Code, if the taxpayer proves that the violation was neither willful, intentional, nor the result of the failure to take practical precautions.

I. T. 3627, C. B. 1943, 111; I. T. 3630, C. B. 1943, 113; I. T. 3799, C. B. 1946-1, 56; and I. T. 3800, C. B. 1946-1, 82, are hereby modified to the extent inconsistent with the views expressed herein.” (Rev. Rul. 54-204, 1954-1 I. R. B. 50-51.)

March 26, 1953, 1954 C. C. H. par. 9428; *Woods Cross Canning Co. v. Korth*, D. C. Utah, Jan. 20, 1953, 1953 C. C. H. par. 9200; *Maier Brewing Co. v. United States*, D.C. S.D. Cal. C.D., No. 12534-C, Jan. 31, 1952, 1952 C. C. H. par. 9208; *Utica Knitting Co. v. Shaughnessy*, 100 F. Supp. 245, D.C. N.D. N.Y. (1951).

⁷*Hershey Creamery Co. v. United States*, 101 F. Supp. 877 (1952).

We fail to find this ruling even mentioned in Appellant's Brief.

The state of the law on this subject at the present time can be best summarized in the language of this Court, as follows:

“It seems to us that allowance of the sum paid to the government may be allowed as a business deduction when the overcharge has been innocently and unintentionally made and not made through an unreasonable lack of care. * * *

* * * * *

Where the payment has been made in circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law it would be an ordinary and necessary expense. Allowance of the deduction in these circumstances could not frustrate the enforcement of the Act.” (*National Brass Works, Inc. v. Commissioner of Internal Revenue*, 182 F. 2d at 530 and 531.)

We shall now proceed with a review of the evidence in this case in an effort to determine whether the District Court's findings and conclusions that the alleged violation here involved were made under circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law, are supported thereby and are not “clearly erroneous.”

The Evidence Abundantly Supports the District Court's Findings and Conclusions and Establishes That They Are Not Clearly Erroneous; the Administrative Acceptance of Single Damages Is Positive and Compelling Evidence Supporting Deductibility.

Appellee contends that the following uncontradicted evidence establishes that the District Court's findings of fact and conclusions of law are amply supported and are not "clearly erroneous."^{7a}

Confusion Over Ceiling Price.

The general maximum price regulation, which was issued on April 28, 1942, fixed the price at which Appellee could sell its products at the same price at which it had sold them during the month of March, 1942. [Ex. 16, p. 1.] Since Appellee had not sold fancy light meat tuna during March, 1942, it was required, under GMPR, to adopt as its ceiling price for that commodity the price which was charged during that period by its nearest competitor. There was considerable dispute and confusion among Appellee's officials as to who was its nearest competitor. John V. Morris, general counsel of Appellee, was consulted about which company would be Appellee's nearest competitor. [R. 111.] He advised M.

^{7a}Rule 52(a) of the Federal Rules of Civil Procedure provides in part as follows:

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Where there is sufficient evidence to sustain findings which the District Court made adverse to the position of Appellant on various questions of fact, the judgment will be affirmed on appeal. (*Rose v. United States*, 188 F. 2d 474 (C. C. A. 9, 1951).)

J. Bogdanovich, Appellee's president, that Van Camp Sea Food Company was not comparable and that other packers like "* * * Coast Fishing Company in Wilmington, which is a few miles from their plant in the same harbor, or West Gate Seafood in San Diego, due to their size and due to our size, and tuna packing, would be more comparable or nearer competitors of ours." [R. 114.] Moreover, he advised that Appellee could sell its fancy light meat tuna through High Seas Tuna Packing Company of San Diego, which was under common control with Appellee, at a ceiling price of \$14.00 per case, which had been fixed by the OPA. [R. 92, 114-115, 209-210.] Appellee's president rejected these suggestions because "* * * he didn't want to profiteer * * *." [R. 116.] On the contrary, he accepted the suggestion of Mr. A. T. Williams, Appellee's sales manager, and used as Appellee's ceiling the \$11.00 price which was that used by Van Camp Sea Food Company, admittedly the lowest price in the industry.⁸ [R. 111, 164-165, 173-174.]

In this connection it must be remembered that we are dealing with a time (the Summer and Fall of 1942) when OPA was very new to industry. There were grossly inequitable situations resulting from GMPR which were recognized by everyone, including OPA officials. [R. 80-81.] Steps were being taken to remedy these inequities. [R. 165-167.] So far as tuna was concerned, prices

⁸Van Camp sold very little fancy light meat tuna, and concentrated on other products primarily so that their "* * * profitable business on products from tuna livers and oils, which has grown to an extent which might even cause them to lose interest in possible profits on canned tuna. A very low ceiling on canned tuna might not discommode Van Camp but might be harmful to other canners who did not have the foresight to develop a business on the livers and oils from tuna." [R. 207.]

upon the same product at the same time ranged from a low of \$11.00 to a high of \$14.00, or more. [R. 92.] That these inequities existed was recognized in the Statement of Considerations⁹ accompanying the issuance of Regulation 299 on January 7, 1943, when the price of fancy light meat tuna was fixed at \$12.00 per case.

Economic Dilemma.

While Appellee was attempting to sell its canned tuna at the lowest fixed ceiling price in the industry as a result of its own conservative interpretation of GMPR, the cost of its raw fish was steadily and rapidly rising since no ceiling prices were fixed upon the price of raw fish by GMPR. For instance, pursuant to an inquiry Appellee advised Mr. Charles W. Triggs, Chief of the Fish and Seafood Division of the OPA in Washington, that its prices for yellowfin (tuna) had risen from \$160.00 per ton at the beginning of the season in 1942 to \$210.00 per ton in August. [R. 208-209.] This admittedly inequitable situation was recognized early and finally remedied (some six months or so after the alleged violation here involved) by Regulation No. 366, issued on April 13, 1943, which fixed the price of fresh tuna. In the Statement of Considerations which accompanied the issuance

⁹Therein it was stated:

“* * * Because of the rapidly rising market and the fact that in March canners were closing out their previous season’s pack, *the ceiling prices established by various canners under the General Maximum Price Regulation vary widely.* Listed ceilings reported to OPA for Standard White Meat, for example, show a range of from \$20 to \$24 per case; Fancy Light Meat from \$21 to \$28 per case.” (Emphasis supplied.) [Ex. 24, p. 7.]

of that Regulation, the rapidly rising price of raw fish was confirmed.¹⁰

Production Urged.

We are also dealing with a time, during the latter part of 1942, when all canners were being urged to produce and distribute as much of their product as possible because of the growing needs of the civilian economy and the armed forces. Thus, in a letter dated November 16, 1942, Appellee advised the OPA that it was relying upon a statement made by Secretary Wickard at a meeting which was attended by Appellee's sales manager in Washington, on May 8, in which the Secretary was quoted as saying:

“* * * ‘We know that there are many errors in the General Maximum Price Regulation. *We know there are many inequalities. We know that the order was hastily prepared and that many canners will be discriminated against and that many will be treated unfairly.* Therefore we must concern ourselves and continue working to the end that these inequalities be eliminated. *We want production and we do not want anything in this regulation to retard production.*’” (Emphasis supplied.) [R. 214.]

¹⁰Therein it was stated:

“By the end of 1941, yellowfin was bringing \$130.00 per ton. Early in 1942 the price jumped to \$160.00, and by the end of the season the price had advanced to \$190.00. Including bonuses paid fishermen, the 1942 year ended with an average price of \$200.00. * * *” [Ex. 25, p. 4.]

This statement of Secretary Wickard was also considered by Appellee's legal counsel when he advised the course of action which gave rise to the alleged violation.¹¹

This need for production was also confirmed in the Statement of Considerations issued by the Office of Price Administration at the time, April 13, 1943, it fixed the price of fresh tuna fish.¹²

Negotiations With OPA Officials.

Faced with the dilemma of the lowest ceiling in the industry, rapidly rising prices of raw fish, and the pronouncements urging production discussed above, Appellee, through its sales manager, A. T. Williams, conducted extensive negotiations with OPA officials seeking relief from its intolerable position. Mr. Charles W. Triggs,

¹¹In this connection Mr. Morris testified:

"A. We were always reading about pronouncements. I have in mind now one pronouncement that was brought back to my attention in the correspondence that I think was just introduced in evidence, a statement to, I believe, Doc Williams and these other people, and they were gathered in Washington at a meeting by Secretary Wickers [*sic*] to the respect that these regulations were hastily drawn; that they were recognized to be imperfect; that they were subject to correction.

* * * * *

"The Witness: And that there would be many inequalities, or words to that effect, that many canners would be hurt, that these would be eliminated or worked out as time went on. And that we could not let these inequalities stand—or these regulations stand in the way of production—which led me to believe that OPA would correct anything that was wrong, because that was the pronouncement from there." [R. 120-121.]

¹²Therein it was stated:

"The armed forces this year are vitally interested in obtaining canned tuna. Stability in the market at this time is mandatory. It now appears that 60 per cent and possibly more of the tuna pack will be acquired for the armed forces. Con-

who was at that time Chief of the Fish and SeaFood Division of the OPA in Washington, testified as follows:

“During that summer [1942] Mr. Williams came to Washington. We discussed their situation and there was some talk about prices that they might be entitled to, and I think that at least four or five times Mr. Williams must have seen me before the regulation—the new regulation went into effect.” [R. 157.]

* * * * *

“And—pardon me—he also telephoned numerous times from Terminal Island to see if we were going to get out the regulation.” [R. 158; see also 164.]

In addition, the record discloses several items of correspondence between Appellee and the OPA regarding the ceiling prices on tuna. [See Exs. 2 to 10; R. 200-219.]

During these negotiations Appellee was led to believe that it was entitled to an increase in its ceiling price. Triggs testified:

“Mr. Grady: ‘Q. Was it your opinion after talking with Mr. Williams and investigating their

tracts may be entered into with some degree of certainty now that canners’ prices will not be changed by reason of uncontrolled prices for the raw product.

* * * * *

“Having already established prices for canned tuna which bears (*sic*) a proper relationship with the prices fixed in this Regulation for the fresh fish, there should no longer be any uncertainty or unrest in any part of the entire industry. Producers, canners and distributors have fair ceiling prices on which to operate their businesses. This in itself should encourage peak production, particularly since the history of the industry discloses that disharmony created over price quarrels has been a most disturbing factor. After the armed forces have been supplied their quotas, civilians will be able to purchase tuna at the same prices now being paid. * * *.” [Ex. 25, p. 5.]

ceiling prices that their ceiling prices were too low and some relief should be given to them?’

* * * * *

‘A. I was certainly of that opinion.

Q. And did you have that opinion in the summer of 1942? A. In the summer of 1942.

Q. Yes. Did you so state to Mr. Williams? Did you advise Mr. Williams that the prices were too low or did you agree with Mr. Williams that their ceiling prices were too low?’

* * * * *

‘A. I didn’t advise him. I agreed with him that the prices were too low.

Q. That’s what I mean. Having determined in the summer of 1942 that the ceiling prices of French Sardine Company with respect to canned tuna were too low, what steps did you take or were taken by the OPA to alleviate that situation?

A. No steps were taken that would alleviate that. That is, nothing was done until the new regulation came out. Consideration was given to the situation through the summer and fall of 1942, but owing to the amount of work that we had getting out other regulations, amendments and so forth, we did not have the staff to get out a tuna regulation until—the record shows—January 13th; but it was well known through the latter part of the summer of 1942, not only by myself but by members of the staff, that we had to have a higher level of prices which in addition—outside of tuna would apply to other commodities as well, such as I stated before on salmon.’” [R. 165-167.]

* * * * *

“A. In August 1942 we [Triggs and Williams] discussed what was doing on other canned fish, and

I am quite sure I left the impression with him that they would be entitled to an increase in price because I felt sure we were going to establish a higher price—in fact, I knew we were—establish a higher price than \$11; and even if it was based on the average of the various canners it would be not only \$12 but I think higher than \$12. So that was the reason why I would have discussed with him the possibilities of an increase in price.” (Emphasis supplied.) [R. 172.]

“Q. By Mr. Mackay: Well, under those circumstances is it fair to deduce from your testimony that the industry was reasonable in its expectation that a higher price would be fixed?”

* * * * *

‘The Witness: I think that would depend largely upon the members of the industry. A canner who was fortunate to have a high ceiling price under general max would not be so anxious I think to see the regulation of [*sic*] a canner who had a low ceiling price.” [R. 174-175.]

Moreover, new dollar and cents ceiling prices were actually fixed on several canned fish products during the late Summer and Fall of 1942, by issuance of the following regulations:

<u>Regulation</u> <u>No.</u>	<u>Date</u>	<u>Product</u>	<u>Ex. No.</u>
184	July 23, 1942	Maine Sardines	17
209	Aug. 31, 1942	California Sardines	18
247	Oct. 24, 1942	Domestic Canned Crabmeat	20
252	Oct. 30, 1942	Vinegar Cured Herring	21
265	Nov. 9, 1942	Salmon	22
277	Nov. 28, 1942	Mackerel	23

The ceiling prices fixed by these regulations were higher than the lowest ceilings under GMPR. For instance, Regulation No. 209, effective August 31, 1942, fixed the prices at which Appellee was entitled to sell its sardines at figures which averaged 20.9% higher¹³ than the ceiling price which Appellee had had under GMPR. [R. 42, 144.]

Increased Inventory and Low Cash Position.

While awaiting the new anticipated dollar and cents ceiling prices on canned tuna, Appellee accumulated a rather large inventory with a value of over a half million dollars. [R. 216.] During the last week in August and the first three weeks of September, 1942, Appellee shipped about 40 carloads of canned tuna without invoicing it. [R. 205.] Toward the end of September Appellee's cash position became relatively low. Whereas Appellee's cash expenditures averaged approximately \$235,000.00 per week during the sardine season months of October through December, Appellee had on hand cash in the amount of \$144,919.07 as of September 24, 1942, *i.e.*, less than a week's supply to pay plant payroll, trade accounts, fishermen accounts and other cash requirements. [Ex. 33.]

¹³Since Triggs cited these new regulations as examples of what could be expected to be done on tuna, *i.e.*, that additional costs were to be reflected in the new dollar and cents ceilings, it would appear that appellee was again conservative in selling its tuna at \$12, an increase of only \$1, whereas a 20.9% increase would have warranted an increase of \$2.30, *i.e.*, to \$13.30 per case. [R. 158, 173.]

The Alleged Violation.

Faced with this situation, *i.e.*, a large inventory, 40 carloads of tuna shipped but not invoiced, a critically low cash position, and expecting a new dollar and cents ceiling price to be issued “momentarily,” Appellee was forced to take some action in the latter part of September, 1942, to prevent financial disaster and “complete liquidation.” [R. 198, 205, 210.] Accordingly, acting upon the advice of its counsel¹⁴ [R. 120] it invoiced its brokers and placed the following notation upon the invoices:

“ ‘Please remit in accordance with this invoice. If O.P.A. fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1½s and \$2.00 per case less on 48/1s, and will refund you accordingly.

French Sardine Company, Inc.’ ” [R. 238.]

¹⁴In the second Tax Court hearing in the *National Brass* case the court found that the taxpayer acted against the advice of counsel and denied the deduction. 16 T. C. 1051. However, the Tax Court has also held that acting upon the advice of counsel constitutes taking reasonable precautions. Thus in *Philip E. Ludwig*, 13 T. C. M. 471 (1954), three members of a partnership, who consulted their attorney and followed his advice were held to have taken reasonable precautions to avoid violating the law and had not intentionally violated, notwithstanding the amount paid in settlement constituted 150% of the amount of the overcharges. In declining to make a finding that the violation was intentional the court stated:

“* * * We think that such a finding is precluded by the reliance of the partners on the advice of counsel throughout the period of regulated prices. The evidence shows that while the partnership was restricted as to the selling price of coffee, there was no control over the amount it had to pay. The resultant squeeze on the partnership would not, of course, justify a violation of the regulations, but the partners naturally sought by every lawful means to escape from this economic dilemma. * * * ” 13 T. C. M. at p. 473.

Simultaneously, Appellee sent a mimeographed notice to all of its brokers, reciting the above notation and advising them to bill with a similar notation upon their invoices, and also advising them as follows:

"We have been advised many times direct from the Washington office of O.P.A. about their intent to equalize the vast differences in prices between canners. We have been repeatedly told that we may expect an increase on the low ceilings and a decrease of the high ceilings.

"When on August 26th, the O.P.A. actually took this step on the item of California Sardines, we believed that similar relief would be forthcoming shortly on the other items. However, these government agencies have so many angles and so many people to please or placate that undue delays sometimes arise."¹⁵ [R. 237.]

On that same day, September 24, 1942, Appellee advised Mr. Triggs by letter of the action it was taking and also sent him a copy of its notice to brokers. [R. 168, 175, 198, 205.] Indeed, there is substantial evidence to indicate that Triggs gave at least tacit acquiescence to the action taken by Appellee. He testified:

"A. Well, I might have made the statement that I would support anything that they might do if it

¹⁵It is significant in this connection that Mr. Triggs testified as follows:

"Q. By Mr. Mackay: Mr. Triggs, was the delay in getting out a new price ceiling regulation caused in any respect by your unwillingness to set a higher ceiling price on French Sardine tuna?

"A. Not at all. The delay was entirely caused by the amount of work we had to do in getting out various regulations, not only canned fish but frozen fish and fresh fish. We had an immense amount of work, a limited staff, and it takes quite a long time to gather—it did take quite a time to gather the necessary information that would warrant our establishing the regulation." [R. 174.]

was within reason. That would be logical for me to do. Inasmuch as we were allowing increased prices on other canned fish, I might possibly have made the statement they wouldn't be taking any chances or something of that kind.

Q. I didn't hear you.

A. That they might not be taking any great chances in raising the price because I was of the firm belief that they were in a bad position." [R. 159.]

Moreover, Appellee's counsel (Mr. Williams—sometimes referred to as "Doc"—having died before the trial) testified as follows:

"* * * And Doc's contacts with Triggs, his phone calls with Triggs, his correspondence with Triggs—as I remember it, Doc stating as to what Triggs said to him, especially with respect to the price ceiling, and that we thought—then that Doc thought that it was all right to go ahead and base our prices at \$12." [R. 119.]^{15a}

^{15a}The Government argues that Appellee did not take practicable precautions since it should have formally applied for a price adjustment ruling pursuant to the provisions of Procedural Regulation No. 1, 7 Fed. Register 971 (pp. 18-19, Brief for the Appellant). This argument has already been rejected by the First and Fourth Circuit Courts of Appeal. In the *Pacific Mills* case, the First Circuit Court stated in part as follows:

"* * * we do not see how it can be said that practicable precautions were not taken because an advisory ruling was not requested unless we are willing to say that 'practicable precautions' means every precaution, which would rob the phrase of its meaning, for either there would have to be resort to Procedural Regulation 1, in which event there would be no violation, or else there would automatically be a failure to take 'practicable precautions.'" (207 F. 2d at 183.)

See, also:

American Brewery v. United States, 223 F. 2d 43, 48 (C. C. A. 4, 1955).

A total of 97,215 cases were billed, as indicated above, prior to the time Regulation No. 299 was issued on January 7, 1943, which fixed the price of fancy light meat tuna, basis 48/1½s at \$12.00, exactly the price reflected in Appellee's invoices to its brokers. Subsequently OPA claimed that there was a violation of GMPR, which claim was settled in May, 1943, by Appellee paying the exact amount of the overcharges to the Treasurer of the United States.

The Significance of the Settlement.

Appellee contends that the Administrator's acceptance of single damages, *i.e.*, merely the amount of the overcharge, in lieu of treble damages, has great probative significance in this case. Judge Learned Hand placed great emphasis upon the probative effect of such a settlement in writing the Court's opinion in the *Jerry Rossman* case. In discussing whether single damages are deductible, whether or not denominated a "penalty" he stated:

"This conclusion leads directly to the third question: whether, even though the overcharge was a 'penalty,' its allowance as a deduction would 'frustrate' any 'sharply defined policies' of the Emergency Price Control Act of 1942. It is impossible to find an answer in general terms; indeed any answer goes to the very root of one's theory of criminal law. Happily, in the case at bar, we are not left to speculation, for we have an answer from the best possible source—the Administrator himself. * * * It seems to us that we should accept these expressions as evidence that in cases where the Administrator accepted the overcharge as sufficient, it did not 'frustrate' any 'sharply defined' policies of the Emergency Price Control Act of 1942." (175 F. 2d at 713-714.)

And later in the opinion Judge Hand stated further:

“* * * Third, we say that there was positive and compelling evidence that to allow such a deduction would not ‘frustrate’ the policies of the underlying act. * * * The practice of the Administrator was to accept the overcharge as adequate compliance only if the seller had both acted in good faith, and had taken all ‘practicable precautions’; * * *. * * * the Administrator’s consent to accept the overcharge showed that he thought that the taxpayer had in fact used adequate care; and that was enough. We do not say that his decision was final; but it stands uncontradicted, and it was the judgment of one who was in the best possible position to make an estimate.”¹⁶ (175 F. 2d at 714.)

In the instant case we have much more than a mere record of acceptance of single damages by the Administrator. And in this connection it is significant that Appellant’s brief is strangely silent upon significant portions of this evidence, which consists of the decision of the local enforcement officials in Los Angeles and the decision and testimony at the trial of the two top Govern-

¹⁶Judge Hand’s suggestion has apparently been adopted as a matter of policy by the government. When it was again found necessary to impose rigid price controls on the economy during the Korean War, the President of the United States was given the power to prescribe the extent to which any payment made to the United States in compromise of a violation of price ceilings shall be disregarded in determining expenses or costs, for all purposes including computation of taxable income. Sec. 409(1) of the Defense Production Act of 1950, 50 U. S. C. 2109(d). By Executive Order 10161 (15 Fed. Register 6105, September 12, 1950) these powers were delegated to the Administrator of the Economic Stabilization Agency. General Order No. 15 (17 Fed. Register 2994, effective April 5, 1952) gives to the Director of Price Stabilization (who is in a position quite similar to that of the Administrator in the instant case) the power to determine the extent to which any payment made on account of a violation shall be dis-

ment officials in Washington responsible for fixing the prices of tuna and enforcing the prices fixed, namely, Triggs and Herman A. Greenberg.

First, let us consider the settlement effected at the local (Los Angeles) level. In a letter to Mr. Triggs, dated May 6, 1943, Mr. Williams described the opinion of the local officials and their reasons for settling the alleged violation for single damages, thus:

“* * * We were told that we had violated the General Maximum Price Regulations although it was admitted that we did not violate the intent or purpose of the act.

Then we were told that, in view of the extenuating circumstances, the enforcement agency would be lenient to the extent that they would consider the matter closed if we would present them with a check in favor of the Treasurer of the United States for the exact amount, not treble damages, of what they considered the excess charges, as a contribution to the war effort.

* * * We were told that, inasmuch as the matter is in the hands of the enforcement agency,

regarded for tax purpose and, through the National Enforcement Commission, to certify said amount to the Bureau of Internal Revenue. General Order No. 18 (17 Fed. Register 6925, July 29, 1952). General Disallowance Order 1 (17 Fed. Register 9934, effective October 24, 1952) sets forth the criteria for determining whether such payments shall be disallowed, and states in part:

“Sec. 2(b) * * * *Provided, however, that the amount so paid to the United States or to any buyer shall not be disregarded for any purposes or to any extent if the total of the amount so paid (exclusive of attorney's fees, court costs or interest, if any) does not exceed the total amount of the overcharge or overcharges upon which such liability, right of action, suit, or judgment was based.* * * *” (Emphasis supplied.)

The Commissioner of Internal Revenue has agreed to accept the judgment of the price enforcement authorities for tax purposes. I. T. 4105, 1952-2 C. B. 9.

we have no other recourse but to comply with their offer of settlement.” [R. 221-222.]

In compliance with OPA's offer of settlement, Appellee delivered its check dated May 20, 1943, payable to the Treasurer of the United States, which was sent, together with a report of the whole matter, to Washington for advice as to whether, under the facts of this case, single damages should be accepted in view of the Administrator's existing policy. In Washington, the matter was handled personally by Herman A. Greenberg, who was at the time the Chief of Enforcement of the Meat and Dairy Products Branch. [R. 70, 197.] Mr. Greenberg testified at the trial as a witness called on behalf of Appellee. He described the Administrator's existing policy and the Los Angeles official's action in these words:

“* * * as a strict administrative policy, which we adhered to at that time, our instructions from the Washington office to our regional office and district offices was that under no circumstances, with one exception, would less than treble damages be accepted in a claim by the administrator. That exception was where we were satisfied that the violation was innocent and inadvertent and non-willful. Only in that case were they to accept less than treble damages, * * *. * * *

Now then, with that policy in mind it was necessary for me at the time that I wrote this memorandum to make a decision. The Los Angeles District Office of the OPA, which was negotiating this with the French Sardine Company, realized that it could not accept a single damage settlement under our policy unless a showing of inadvertence and

nonwillfulness was made; and it was for that reason that the Los Angeles District Office, which had normally the authority to settle its own cases, wrote to Washington to get permission on a showing of the facts to settle this for less than treble damages—that is, single damages—pointing out that in their opinion this was a nonwillful, inadvertent type of violation.” [R. 77-78.]

Next let us examine further testimony of Herman A. Greenberg. He was the person, charged with the responsibility of enforcing the regulations which Triggs issued. [R. 73.] Here was the man who, in the language of Judge Learned Hand, “* * * was in the best possible position * * *” to judge whether the violation was willful, or the result of failure to take practicable precautions. This is what Mr. Greenberg said:

“The Witness: My best recollection is that on receipt of this memorandum from the Los Angeles District Office of the OPA I went to see Mr. Triggs and asked him what conversations and negotiations he had had with the French Sardine Company. He advised me generally of those conversations and showed me a file which he had which consisted of written communications from the French Sardine Company from which all these facts appeared—that is, the fact that the company had been caught with a very low ceiling price under the general maximum regulations, that they had continued to can tuna but put it in inventory because they had stated they couldn’t afford to sell at their ceiling price because of the increased price of raw tuna; that this was going on for a long period of time; was becoming burdensome to the company; that they inquired of Mr. Triggs what relief they could have; that Mr.

Triggs assured them a dollar and cent regulation would issue and that probably the price would be in the neighborhood of \$12 a case; that nevertheless the company refrained from shipping tuna until finally with the regulation, the dollar and cent regulation not issuing, in desperation they come back to Triggs and between them they advised the Government wholly—

* * * * *

The Witness: —that the French Sardine Company kept Mr. Triggs advised and suggested to him that they ship this tuna at \$12 a case with an agreement with their customers if and when the dollar and cents regulation issued, if it came out anything less than \$12 they would refund the difference to them.

I discussed with Mr. Triggs whether he had those conversations and he agreed that, generally, he had had those conversations; he was very much in sympathy with the position of the company. I took the position myself—it was my duty to make a decision, and I took the position myself that the company had acted aboveboard, no willfulness, as we understood it, willfulness which we ran into in great number in those years, and which consisted of fraud of one kind or another, double entry, double sets of books, cash on the side and that sort of thing, but this company to the contrary had operated absolutely in the open; and that they had discussed their matter with a person who has ostensible authority for the Government—that is, Mr. Triggs. Mr. Triggs is a fine gentleman. And that they then proceeded on the basis of their discussions with Mr. Triggs, and I felt that this fit our policy of innocence and inadvertence, that the company did what it could and

reasonably proceeded the way it did as a general exception to our rule of acceptance of single damages.” [R. 80-82.]^{16a}

Then, too, Mr. Triggs himself had a firm contemporaneous opinion in respect of whether the alleged violation was willful. He testified as follows:

“A. I would say it was a technical violation. I couldn’t say it was a willful violation. It might be a technical violation.” [R. 179.]

Mr. Triggs was shown Appellee’s check for \$97,215.00 (representing single damages) by Mr. Greenberg in Washington and asked whether, in his opinion, it should be accepted or whether the government should seek treble damages. He testified:

“Q. And will you please state again what you said when you were shown that check? A. I told—I explained the circumstances of how that was received by the government, by OPA in Los Angeles, and told him that, knowing what I did, if I had my way I would return the check to the French Sardine Company * * *.”

* * * * *

^{16a}We are not left to Mr. Greenberg’s present recollection of the matter. There is in evidence, as Exhibit No. 1, an official memorandum which he wrote on June 5, 1943, contemporaneous with his decision. That memorandum states in part as follows:

“* * * On the basis of Mr. Triggs’ statement to us it appears that there is a substantial reason for accepting single damages. He claims that the Company had a fairly low ceiling under the GMPR last fall. The ceiling was \$11 per case while competitors ceilings went as high as \$17 per case. The Company was in constant communication with the Price Division of the National Office requesting relief and were assured that a dollar and cent regulation which would give them relief was to be issued momentarily. * * *” [R. 198.]

‘Q. And you made that statement in June of 1943? A. June 1943.

Q. Let me ask you this: If that statement you then made to Mr. Greenberg was based upon your conviction at that time as Chief of the Fish Section that there had been no violation or intention of violation of the law or regulations by the French Sardine Company?’

* * * * *

‘The Witness: I based that on the knowledge that I had received and knowing that the French Sardine Company had tried to go along with OPA and not violate and knowing what the price of tuna—price of other canners, I had no hesitancy in stating that French Sardine Company should not be prosecuted for violation because what they did was really open and above board.

Q. By Mr. Mackay: In your dealings with the French Sardine Company during 1942 did you find anything in connection with this ceiling price, any act on their part which would indicate that they did not want to come along and not co-operate with the Price Administration Office?

A. Not at all.

The fact that they communicated with me repeatedly, called me on the phone, and Mr. Williams visited me in Washington, my office there, the Office of Price Administration, at different times, assured me that there was no effort being made on their part to violate. I was conversant with what was going on.” [R. 170-172.]

Thus we have here strong expressions, by the men primarily responsible for administering the OPA law and regulations, to the effect that the alleged violation

was not willful, but that what Appellee did was in a good faith attempt to comply with the law. Appellee suggests that this evidence strongly supports the District Court's findings and conclusions.

The Government (on pp. 22 to 25 of Brief for the Appellant) contends that the administrative determination to accept merely the amount of the overcharge is not binding upon this Court and does not bring into play the doctrine of *res judicata*. Appellee does not contend to the contrary. Appellee's contention is simply that such action in this case constitutes, as it did in the *Jerry Rossman* case, "* * * positive and compelling evidence that to allow such a deduction would not 'frustrate' the policies of the underlying act. * * *" (175 F. 2d at 714); and further, that the administrative determination is significant uncontradicted evidence which this Court may consider in deciding whether the lower court's findings are "clearly erroneous."

The government, in seeking to dilute the force and probative effect of the Administrator's action in this case, relies heavily upon *George Schaefer & Sons, Inc. v. Commissioner*, 209 F. 2d 440 (C. C. A. 2, 1954). In discussing the question of the significance of the administrative settlement in that case the Court said in part, as follows:

"The settlement means very little since, at the time it was effectuated, the OPA had expired (on June 30, 1947—50 U. S. C. Appendix, §901), and we may surmise its staff of lawyers and investigators had been disbanded. On that account, the investigation necessary to prove the case at trial against the taxpayer may have been unavailable. * * *" (209 F. 2d at 441.)

The settlement involved was effected on October 31, 1947, more than two full years after the end of the war and also long after OPA had been discontinued.¹⁷

In the instant case the exact opposite situation prevailed. The settlement was effected on May 20, 1943, when OPA was in full bloom; when it was carrying on a most vigorous enforcement program to make object lessons out of violators for the purpose of deterring others from violating the Act. In this connection Mr. Greenberg testified as follows:

“* * * The war was going badly for us at that time. We were under the most insistent pressure at the time, both from Congress and other sources, to—

* * * * *

The Witness: —to enforce these regulations vigorously. That we attempted to do. * * *” [R. 74.]

* * * * *

“The Witness: At that time in 1943, as I said, we were under instructions to proceed very vigorously in the enforcement of these regulations, and we did to the utmost of our ability. * * *” [R. 76.]

In view of the compelling differences in circumstances surrounding the administrative settlement in the two cases,

¹⁷There are other facts in the *Schaefer* case which may have had a bearing upon the Court's decision to affirm the Tax Court's disallowance of a deduction. For instance there was testimony of an officer of the taxpayer that he inquired of OPA concerning whether there was to be an increase in the price of turkeys and learned nothing about any such proposed action. Moreover, the taxpayer did not urge in the Tax Court nor in the Circuit Court that any new amendment regulating turkey prices was promulgated. These facts alone distinguish the *Schaefer* case from the instant case.

Appellee urges that the *Schaefer* opinion is of little or no significance.¹⁸

Appellee respectfully urges that all of the above described evidence amply supports the District Court's findings and establishes that they are not clearly erroneous.

The Hershey Creamery Company Case.

Appellee contends that from a factual standpoint the case of *Hershey Creamery Company v. United States*, 101 Fed. Supp. 877, Ct. of Cl. (1952), is probably the decided case most closely parallel to the facts in the instant case. In the *Hershey* case the taxpayer, a manufacturer of dairy products (principally ice cream), found it necessary to seek relief from existing price ceilings on its products because of rising costs. It filed three separate applications for relief with OPA—all of which were denied, ultimately. However, on two separate occasions, while the applications were pending, the taxpayer inquired of OPA officials concerning their status and was advised that an order granting relief would be forth-

¹⁸It is interesting to note how inconsistent the government's position has been upon the question of whether the Administrator's determination is entitled to any weight. Thus in the *Pacific Mills* case, where the taxpayer had paid slightly more than the single damages for which OPA might have brought action—due to the statute of limitations, the government's contention is described by the Court as follows:

“Then the Commissioner asserts that the Tax Court erred in its ultimate conclusion because it did not ‘accord proper respect’ to what he calls the ‘Administrator’s judgment’ that *Pacific Mills* had failed to take practicable precautions. * * *” (207 F. 2d at 183.)

Apparently the government's position is that the Administrator's judgment is entitled to respect only when it has been exercised in a manner favorable to the government. Merely to state such a proposition refutes it.

coming shortly. Although the order was not forthcoming as promised, plaintiff increased its maximum selling prices sometime during the first two weeks of February, 1943. In June, 1943, in reliance upon similar advice, plaintiff again increased its price (it having been meanwhile lowered to the proper ceiling) and kept selling at the increased price until the application for relief was denied in August, 1943. Thus for two separate periods (once for two weeks and once for approximately two months) plaintiff overcharged its customers. However, the Court of Claims allowed the \$81,118.62 paid by plaintiff to OPA, in settlement of a suit for treble damages which had been filed, as a deduction, saying:

“Plaintiff has established to our satisfaction that the overcharges were unquestionably exacted in good faith, and without intent to violate the ceiling prices. Plaintiff had been in repeated contact and conference with the officials of the Office of Price Administration concerning relief prior to the dates of both price increases, and when it eventually raised its prices, it did so only in reliance upon statements of the officials of the Office of Price Administration that the requested relief would be forthcoming within a few hours. Overcharges made pursuant to such advice do not, in our opinion, indicate a willful intent to violate the Act. * * *” (101 Fed. Supp. 877 at 883.)¹⁹

¹⁹That Appellee acted upon expectations of an increased ceiling to be issued momentarily, see Williams’ letter of December 5, 1942, wherein he stated in part:

“* * * We were informed that we would not be taking any chances, as, undoubtedly, the new ceiling would be promulgated before the Tuna could arrive.” [R. 216.]

Appellee respectfully submits that the instant case is even a stronger one for allowing the deduction, primarily for two reasons: First: the need for the increased ceiling was so obvious and glaring that it was granted, rather than denied by the Office of Price Administration. Secondly: when Appellee invoiced its customers it agreed to refund the \$1.00 per case increase to the buyer, if the quoted price was not approved. There is no indication in the opinion that a similar precaution was taken in the *Hershey* case.

Conclusion.

It thus appears that the status of the law is to the effect that if the violation of the OPA law or regulations has not been willful, but rather has been innocently and unintentionally made under circumstances which are inconsistent with an intention to violate the Act, and inconsistent with a lack of due care to conform to the law, the deduction is allowable. The fact that OPA, at the time of the violation, was willing to accept single damages, constitutes positive and compelling evidence that the violation was not willful, but rather was innocently and unintentionally made. In the instant case, the District Court has found that Appellee paid only single damages, and made the alleged overcharges involved innocently, unintentionally, and under circumstances which are inconsistent with an intention to violate the Act and inconsistent with a lack of due care to conform to the law. There is substantial evidence to support these findings and they

are not clearly erroneous. Accordingly, under the law and the facts of this case, the judgment should be affirmed.

Dated November 23, 1955.

Respectfully submitted,

MACKAY, MCGREGOR, REYNOLDS & BENNION,

By A. CALDER MACKAY,

ARTHUR MCGREGOR,

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Attorneys for Appellee.





APPENDIX.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(26 U. S. C., 1952 Ed., Sec. 23.)

United States Court of Appeals
For the Ninth Circuit

MARGURITE L. CONNELL, *Plaintiff-Appellee,*

vs.

EDGAR ROBERT ERRION, also known as E. R. ERRION and
BOB ERRION, AMY ERRION, VIOLET KELLERSTRAUS, and
C. W. WILLIAMSON, *Defendants-Appellants,*

DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER
CORPORATION, a Washington Corporation, INAR GLAS-
ER, DOROTHY GLASER, KATHERINE GOLD, H. A. DAVEN-
PORT, also known as LEE DAVENPORT, CORA SCOTT,
et al., *Defendants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

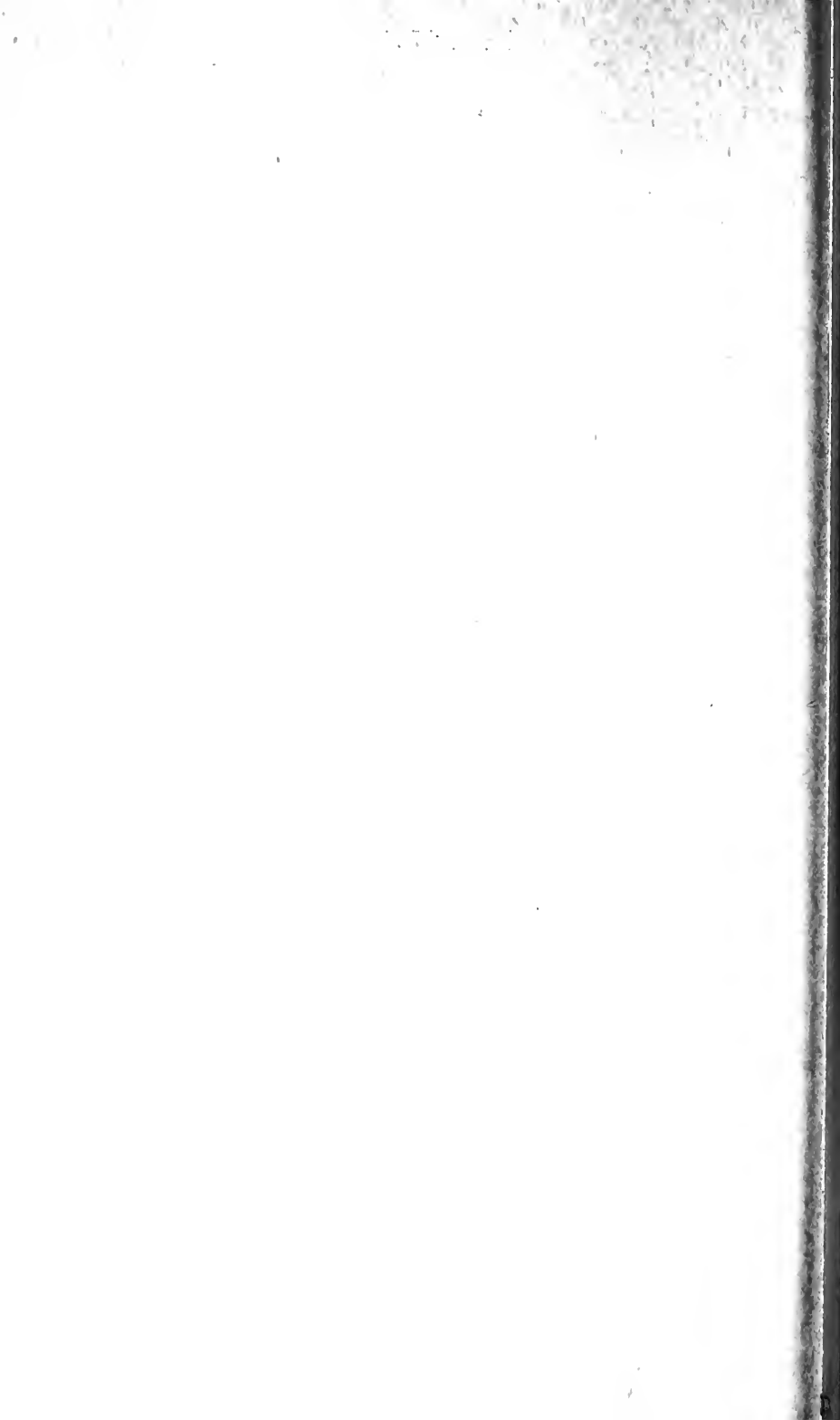
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United States Court of Appeals

For the Ninth Circuit

MARGURITE L. CONNELL, *Plaintiff-Appellee,*

vs.

EDGAR ROBERT ERRION, also known as E. R. ERRION and
BOB ERRION, AMY ERRION, VIOLET KELLERSTRAUS, and
C. W. WILLIAMSON, *Defendants-Appellants,*

DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER
CORPORATION, a Washington Corporation, INAR GLAS-
ER, DOROTHY GLASER, KATHERINE GOLD, H. A. DAVEN-
PORT, also known as LEE DAVENPORT, CORA SCOTT,
et al., *Defendants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

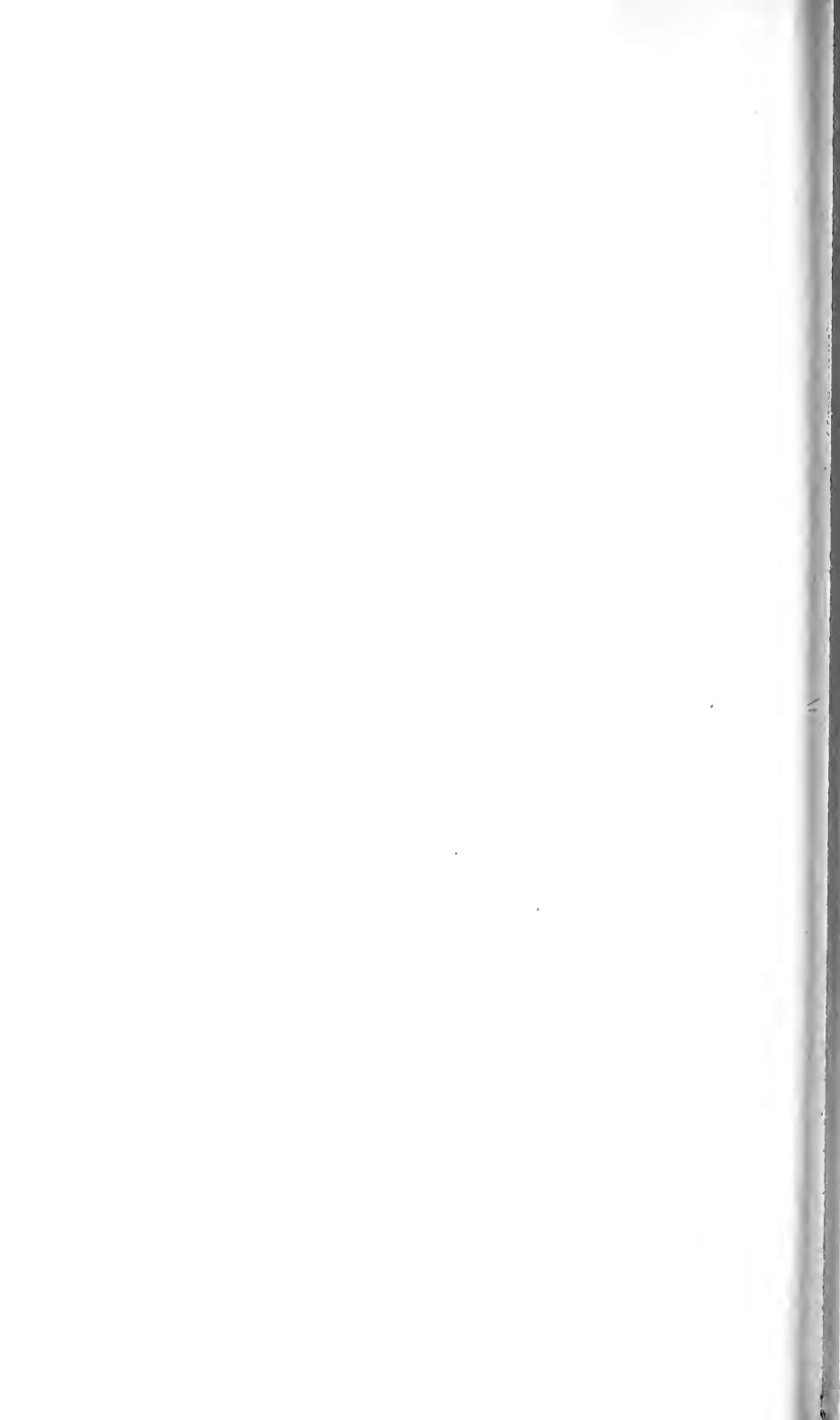
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United States Court of Appeals

For the Ninth Circuit

MARGURITE L. CONNELL,
Plaintiff-Appellee,
vs.

EDGAR ROBERT ERRION, also known as E.
R. ERRION and BOB ERRION, AMY ERRI-
ON, VIOLET KELLERSTRAUS, and C. W.
WILLIAMSON, *Defendants-Appellants,*

DWIGHT HOLDORF, OPAL HOLDORF, HOL-
DORF OYSTER CORPORATION, a Washing-
Corporation, INAR GLASER, DOROTHY
GLASER, KATHERINE GOLD, H. A. DAVEN-
PORT, also known as LEE DAVENPORT,
CORA SCOTT, *et al,* *Defendants.*

No. 14797

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

I.

JURISDICTION

Jurisdiction of the District Court was sought to be obtained upon and under Section 10(b), Section 27 and Section 29(b) of the Securities Exchange Act of 1934. 15 U.S.C., Sect. 78J(b), Sect. 78AA and Sect. 78CC(b), together with Rule X-10b-5 as promulgated by the Securities Exchange Commisison, 17 C.F.R., Sect. 248, 10b-5.

Those statutory provisions and the above rule are set forth in the appendix.

Allegations in the pleadings alleging such jurisdiction are found in paragraphs I and IX of plaintiff's complaint (R. 2,4, Vol. II). These allegations are denied in appellants' answer (R. 46, 47, Vol. II).

Jurisdiction of this court is based upon 28 U.S.C., Sect. 1291 and 1294. Final judgment was entered January 17th, 1955 (R. 140A, Vol. II). Timely motion for judgment notwithstanding judgment and in the alternative for a new trial was filed January 26th, 1955 (R. 141, Vol. II). Order denying defendants' motion for judgment notwithstanding judgment and in the alternative for a new trial was entered February 9th, 1955 (R. 142, Vol. II). Notice of appeal and bond for costs on appeal were filed with the District Court March 9th, 1955 (R. 144, 145, 146, Vol. II).

II.

STATEMENT OF THE CASE

This is an action for damages, together with rescission of certain instruments, predicated upon matters which were alleged to have been contrary to the Securities Exchange Act of 1934 and the Rules of the Securities and Exchange Commission promulgated thereunder.

Plaintiff was and is now a resident of Seattle, Washington (R. 2, Vol. II) and defendants, E. R. Errion, Amy Errion, C. W. Williamson, and Violet Kellerstrauss, appellants herein, were and at all times mentioned are now residents of the State of Oregon (R. 2, 47, Vol. II).

The complaint is extremely voluminous and it would

be a burden upon the court to quote at length therefrom. It appears in Volume II of the record and takes up the first thirty four pages thereof. Suffice it to say for the present that the complaint alleges that prior to October 19th, 1949, plaintiff was the owner of certain properties (all of which she denominates as securities) having a total approximate value of \$118,000.00 (R. 6, Vol. II); that defendants made certain false representations; and that relying upon such representations on or about October 19th, 1949, plaintiff transferred all of her "securities" to defendants for and in consideration of receiving from defendants 125 acres of tideland situated in Coos Bay, Oregon, of a value of less than \$12,500.00 (R. 15, Vol. II).

The prayer of plaintiff's complaint asks for rescission and cancellation of certain instruments and for a money judgment for fraud and deceit against the defendants in the total amount of \$73,576.37 to be increased annually by some \$3,500.00 per year.

On November 10th, 1953 (the complaint having been filed August 29th, 1953, and service being had upon all appellants except appellant Violet Kellerstrauss) appellants, E. R. Errion, Amy Errion, and C. W. Williamson, together with other defendants, filed a motion to dismiss plaintiff's complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action; that it did not support a cause of action under the Securities Exchange Act of 1934 and that the action was barred by the statute of limitations (R. 40, 41, Vol. II). Order denying motions to dismiss was entered February 5th, 1954 (R. 45, 45, Vol. II).

The action having been set for trial for November 3rd, 1954, on September 1st, 1954, Stanley Soderland, the then attorney for all of the defendants except defendants Glaser, filed notice of withdrawal (R. 74, Vol. II). By written order this withdrawal was approved by the District Court October 1st, 1954 (R. 83, 84, Vol. II).

On October 27th, 1954, present counsel for appellants entered notice of appearance for appellants E. R. Errion, Amy Errion, C. W. Williamson and two other defendants who were subsequently dismissed from the action (R. 91, Vol. II), and on the same day filed motion to vacate trial setting and for continuance (R. 94, Vol. II). The motion to vacate and for a continuance was supported by affidavit of counsel (R. 92, Vol. II) and by the affidavit of Herman A. Dickel, M.D., and Blair Holcomb, M.D. (R. 95, 96, Vol. II).

On October 22nd, 1954, John H. Collacutt, a deputy sheriff, of the County of Multnomah, State of Oregon, filed return of personal service upon defendant Violet Kellerstrauss (R. 86, Vol. II). On November 3rd, 1954, present counsel for appellants entered a special appearance and motion to quash service in behalf of Violet Kellerstrauss upon the ground that she was not personally served with process and the court lacked jurisdiction over her person. Affidavits in support of the motion were filed (R. 103, 104, Vol. II).

During the course of the trial the court took oral evidence upon the question of the service alleged to have been made upon Violet Kellerstrauss (R. 5, 21-562). During this testimony the deputy sheriff conceded that

his return of service was false; that he had not made personal service upon Violet Kellerstrauss and sought to uphold his service by substituted service upon Fred Errion (R. 554).

Appellant, Violet Kellerstrauss' motion to quash service and to dismiss was denied (R. 1066 ,R. 108, Vol. II).

Shortly after the beginning of the trial, on November 3rd, 1954, counsel for defendants, E. R. Errion, C. W. Williamson, Bones and Cora Scott, renewed his motion for continuance of the action predicated upon the inability of the principal defendant, E. R. Errion, to be present in court to testify and supported that motion by the testimony of Herman A. Dickel, M.D., a physician practicing in Portland, Oregon, and specializing in the practice of psychiatry. The motion was denied (R. 85, 86).

The trial in the District Court consumed seven trial days. Plaintiff called twenty-one (21) witnesses and either read from or introduced five depositions. Insofar as this appeal is concerned plaintiff's two principal witnesses were plaintiff, herself, and defendant, Dwight Holdorf.

Plaintiff's testimony was substantially in accord with the allegations of her complaint as permitted by the court to be amended respecting the sale of her securities, and throughout the testimony she sought to place the entire onus upon defendant, E. R. Errion. Briefly, plaintiff testified that the transactions upon which she sought relief occurred in the fall of 1949 and that all of her dealings were principally and primarily with de-

fendant, E. R. Errion. There was admitted in evidence, however, as defendants' Exhibit A3 (R. 830) a promissory note dated September 12th, 1949, payable to plaintiff's order in the amount of \$24,624.11 and signed "E. R. Errion." Plaintiff admitted that her signature appeared upon the back of the note (R. 201). (The above sum represented the sale price of plaintiff's securities). Plaintiff also admitted that in March of 1952 in another action she had testified in a deposition that the only transaction she had with defendant, E. R. Errion, was to loan him between \$20,000.00 and \$30,000.00 for which she received a promissory note; that thereafter this note, together with other properties, was turned over, not to Errion, but to the Holdorf Oyster Corporation in exchange for tide lands (R. 204-211).

Plaintiff also admitted on cross-examination that she put her signature upon a receipt which was signed by the Holdorf Oyster Corporation and indicated the list of plaintiff's properties which were turned over by plaintiff to the Holdorf Oyster Corporation. The receipt, a copy of which was originally introduced as defendants' Exhibit A-4 (R. 216) was later admitted in evidence as defendants' A-5 (R. 244). It was dated October 19th, 1949. Plaintiff admitted that on the deposition previously referred to she had testified that all of the documents signed by her were delivered to defendant, Dwight Holdorf, in behalf of the Holdorf Oyster Company, and that that was true and correct (R. 239).

Defendant, Dwight Holdorf, called as a witness by

plaintiff, also sought to place the entire onus and burden upon defendant, E. R. Errion. It would not be helpful to the court to relate Holdorf's testimony in detail, principally because he was completely and wholly impeached on each and every statement made by him on the witness stand. Pages 73 to 922 of the record contain a detailed resume of impeaching statements made by Holdorf at the time of the taking of his deposition in this action, to-wit, January 30th, 1954.

The Trial Court in his oral decision following the trial and on December 29th, 1954, conceded that the testimony of plaintiff had been impeached (R. 1075) and stated unequivocally that Dwight Holdorf's testimony is not to be relied upon because it was certainly impeached (R. 1076).

Insofar as appellants, Amy Errion, C. W. Williamson and Violet Kellerstrauss are concerned, each participated in only a minute portion of the entire transaction and Williamson and Kellerstrauss had nothing whatsoever to do with the transaction until long after the transfer of any of plaintiff's property or the receipt by plaintiff of any oyster lands in consideration therefor.

The only actions of defendant, Amy Errion, were respecting the sale of plaintiff's corporate securities which she testified was a loan transaction between the plaintiff and E. R. Errion (R. 96); the testimony of plaintiff that Amy Errion did some typing for her (R. 161), and the fact that Amy Errion and Mrs. Connell, plaintiff, in 1950 took a trip to Southern California (R. 117).

Amy Errion testified unequivocally that she was acting for plaintiff in the sale of plaintiff's stock in September of 1949; that she had no knowledge of any of the other transactions testified to by plaintiff; that she had typed none of the papers or documents for plaintiff and in 1949, 1950, 1951 did not participate personally in any of her husband's business affairs (R. 1014, 1015).

Respecting appellant, C. W. Williamson, the only manner in which he could conceivably be connected with the matters testified to by plaintiff was in connection with the subsequent lease of the oyster lands from Mrs. Connell to Williamson. The lease was dated December 14th, 1950, and was admitted in evidence as plaintiff's Exhibit 4 (R. 134). Williamson's testimony concerning that transaction appears commencing at page 1025 of the record.

The only connection which could conceivably be alleged as far as defendant, Violet Kellerstrauss, is concerned is that she is the sister of E. R. Errion and that she had the record title to one of the pieces of plaintiff's property in her name at the time it was sold in 1953, June 5th, 1953, to be exact. Violet Kellerstrauss testified that she had merely done what defendant, Dwight Holdorf, had asked her to do and had not discussed the transaction in any respect with her brother, E. R. Errion (R. 585).

Ruling of District Court

In addition to the rulings made during the course of the trial and which have previously been referred to, at the conclusion of plaintiff's case defendants Errion

and wife, Williamson, Cora Scott and Bones, renewed their challenge to the jurisdiction of the court and challenged the sufficiency of the evidence. At the same time the motion in support of the special appearance to quash service upon defendant, Violet Kellerstrauss, was renewed. The District Court granted the motion to dismiss as to the defendants, Bones and Scott, and denied the remainder of the motions without prejudice (R. 1010).

At the conclusion of all of the evidence counsel for appellants renewed their motion for continuance upon the ground and for the reason that the principal defendant, E. R. Errion, was unable to be present (R. 1056) which motion was denied by the District Court (R. 1057).

Likewise at this time counsel for appellants renewed the motion for dismissal and challenge to the evidence in favor of defendants, Errion, Amy Errion and Williamson (R. 1060). The court reserved decisions upon these motions (R. 1060).

On December 29th, 1954, the District Court heard argument and thereafter granted the motion for dismissal on behalf of defendant, Glaser, denied the remaining motions and directed that judgment be entered in favor of plaintiff and against appellants and the other defendants (R. 1065-1079).

Findings of fact, conclusions of law, and final judgment were signed and entered January 17th, 1955 (R. 107, 140A, Vol. II). Order denying defendants' motion for judgment notwithstanding judgment and in the alternative for a new trial was entered February 9th, 1955 (R. 142, Vol. II).

QUESTIONS INVOLVED

As a result of the District Court's rulings in denying appellants' motions for continuance, and denying the motion of defendant, Violet Kellerstrauss, to quash service of summons upon her, in overruling appellants' respective challenges to the sufficiency of the evidence, and in entering judgment against appellants, the following questions are presented to this court for determination:

1. Whether the Securities Exchange Act of 1934 and Rule X-10 B-5 of the Securities and Exchange Commission confers jurisdiction upon the United States District Court for the Western District of Washington over appellants, each of whom were and are residents of the State of Oregon.

2. Whether plaintiff's cause of action predicated upon an alleged fraudulent transfer of property in October, 1949, is barred by the statute of limitations.

3. Whether the judgment of February 17th, 1955, is supported by the findings of fact and conclusions of law as to appellants and each of them.

4. Whether the findings of fact and conclusions of law are supported by the evidence as to appellants and each of them.

5. Whether the United States District Court abused its discretion in denying appellants' motion to vacate the trial setting and for a continuance.

6. Whether the United States District Court erred in denying the motion of defendant, Violet Kellerstrauss to quash service of summons.

III.

SPECIFICATION OF ERRORS

The District Court erred:

1. In holding that the District Court had jurisdiction of these appellants under the Securities Exchange Act of 1934 and Rule X-10 B-5 of the Securities and Exchange Commission, and in overruling appellants' objections to the jurisdiction of the District Court.

2. In holding that plaintiff's cause of action was not barred by the statute of limitations and in overruling appellants' objections that the action was not commenced within the time limited by law.

3. In entering judgment against appellant, E. R. Errion.

4. In entering judgment against appellant, Amy Errion.

5. In entering judgment against appellant, C. W. Williamson.

6. In entering judgment against appellant, Violet Kellerstrauss.

7. In entering judgment against appellants and each of them for the reason that said judgment as to appellants and each of them is not supported by the findings of fact, conclusions of law or the evidence in this action.

8. In entering Findings of Fact No. IX insofar as it refers to an alleged fraudulent transaction with defendant, E. R. Errion.

9. In entering Finding of Fact No. X insofar as it relates to an alleged single transaction with E. R.

Errion, insofar as said finding refers to the promissory note of September 12th, 1949, as being considered by plaintiff as a receipt, insofar as it refers to participation by Amy Errion in any of the transactions therein set forth and insofar as the court finds that there was only one single and indivisible transaction and that appellant, E. R. Errion, participated in any extent beyond the issuance of his promissory note of September 12th, 1949.

10. In entering Findings of Fact No. XI, XII, XIII and XIV insofar as they relate to defendant, E. R. Errion.

11. In entering Finding of Fact No. XV insofar as it relates to alleged untrue statements of material fact made by defendant, E. R. Errion.

12. In entering Finding of Fact No. XVI insofar as it relates to alleged untrue representations as to the future and/or promises alleged to have been made by defendant, E. R. Errion.

13. In entering Finding of Fact No. XVII insofar as it relates to alleged omissions to state material facts alleged to have been omitted by defendant, E. R. Errion.

14. In entering findings of fact No. IX and XX insofar as it is found that defendant, E. R. Errion, persuaded plaintiff not to go to Coos Bay, Oregon, to refrain from discussing her transactions with others and permitted plaintiff to continue to live rent free in her home in Seattle.

15. In entering Finding of Fact No. XXI insofar as

it is found that defendant, E. R. Errion, arranged for defendant, Amy Errion and plaintiff to visit and travel in California in 1950 insofar as it is found that the purpose of said trip and visit was to hinder plaintiff and insofar as it is found that these facts were well known to defendant, Amy Errion.

16. In entering Finding of Fact No. XXIII insofar as it relates to action and representations of defendant, E. R. Errion, together with knowledge of defendant, Amy Errion, in respect to the lease dated December 14th, 1950, and insofar as it relates to knowledge of C. W. Williamson respecting the alleged purpose of said lease.

17. In entering Finding of Fact No. XXIV insofar as it respects actions and directions of defendant, E. R. Errion.

18. In entering Finding of Fact No. XXV insofar as it relates to defendant, Violet Kellerstrauss, and her actions as an alleged part of a scheme to defraud plaintiff, together with the knowledge alleged to have been had by Violet Kellerstrauss of such transactions.

19. In entering Finding of Fact No. XXVII insofar as it relates to alleged representations and inducements made by defendant, E. R. Errion, and plaintiff's alleged reliance thereupon.

20. In entering Finding of Fact No. XXVIII insofar as it relates to the purpose and intent of each and all of appellants, and insofar as it relates to plaintiff's knowledge of the transaction and discovery of the facts thereof.

21. In entering Finding of Fact No. XXIX insofar as it relates to the use of the mails, instrumentalities of Interstate Commerce and facilities of a National Security Exchange by appellants.

22. In entering Finding of Fact No. XXX insofar as it relates to transfer of property to E. R. Errion and action by appellants in disposing of plaintiff's securities and other property.

23. In entering Finding of Fact No. XXXI insofar as it relates to alleged knowledge of appellants and each of them and their alleged acting in concert and tacit agreement to defraud plaintiff and violate the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission.

24. In entering Finding of Fact No. XXXII insofar as it provides for a money judgment against appellants and each of them.

25. In entering Findings of Fact No. XXXIV, XXV and XXXVI insofar as they relate to transactions with any of appellants.

26. In entering Conclusion of Law No. 1 insofar as it holds that appellants or any one of them by their conduct and contracts violated the Securities Exchange Act of 1934 and the rules and regulations of the Securities Exchange Commission.

27. In entering Conclusion of Law No. 3 insofar as judgment was directed to be rendered against appellants and each of them.

28. In overruling and denying appellants' motion to vacate the trial setting and for a continuance.

29. In overruling and denying the motion of defendant, Violet Kellerstrauss, to quash service of summons upon her.

30. In denying appellants' motion for judgment notwithstanding the judgment and in the alternative for a new trial.

IV.

SUMMARY OF ARGUMENT

Appellants' argument upon this appeal will be presented under four principal subdivisions as follows:

1. The District Court lacked jurisdiction over appellants and each of them and over plaintiff's alleged cause of action against appellants for the reason that plaintiff did not establish that any act or transaction constituting a violation of the Securities Exchange Act of 1934 or any rule of the Commission promulgated thereunder occurred within the jurisdiction of the United States District Court for the Western District of Washington. It is appellants' contention that the only securities of plaintiff involved in any of the testimony was her corporate stock which was turned over to E. R. Errion in the nature of a loan and represented by a promissory note signed by Errion, September 12th, 1949 (defendants' Exhibit A-3). It is not established by the evidence that this transaction took place within the jurisdiction of the United States District Court for the Western District of Washington. Thereafter in an entirely separate and divisible transaction plaintiff transferred certain of her properties, including the promissory note, to the Holdorf Oyster Corporation.

2. The transfer of plaintiff's properties took place in August, September and October, 1949, being finally consummated October 19th, 1949, as shown by defendants' Exhibit A-5. Plaintiff's complaint was not filed until August 31st, 1953. Plaintiff did not establish by credible evidence that she failed to discover the fraud worked upon her until some time subsequent to January 1st, 1951, as alleged in her complaint, for under the applicable law the statute of limitations on a fraud action begins to run when the fraud should have been discovered, and a clue to the fact, which if followed up diligently, would lead to discovery is in law equivalent to discovery. The action is barred by the statute of limitations.

3. The judgment of February 17th, 1955, as to each of appellants is not, and the respective findings of fact as to each of the appellants are not supported by the evidence. As to defendants, Amy Errion, C. W. Williamson and Violet Kellerstrauss, there is no evidence whatsoever to establish their participation in or knowledge of any fraudulent scheme to an extent which would justify the judgment of the District Court. As to defendant, E. R. Errion, the judgment must of necessity rest upon the testimony of plaintiff and the testimony of defendant, Dwight Holdorf. The testimony of each was completely impeached in all substantial particulars and thus cannot support a judgment against this defendant. If there were fraud, which we deny, plaintiff is in "pari-delicto" with defendants and thus cannot recover.

4. It was a grievous and material abuse of discretion

for the District Court to deny to appellants and particularly to appellant, E. R. Errion, the motion for a vacation of the trial setting and for a continuance. It is abundantly apparent from the language in plaintiff's complaint and even more apparent from the testimony of plaintiff and defendant, Dwight Holdorf, together with others testifying in behalf of plaintiff, that a studied and concerted effort was made to place the entire onus of the matters complained of by plaintiff upon defendant, E. R. Errion. E. R. Errion, through no fault of his own, and by reason of grievous illness, was unable to appear and defend himself. The testimony of Dr. Herman A. Dickel is undisputed and uncontroverted and for the court to deny the motions to vacate the trial setting and for a continuance was an abuse of discretion as to all of appellants.

5. No proper service was had upon defendant, Violet Kellerstrauss. The affidavit of personal service filed by the deputy sheriff of Multnomah County was admittedly false and the court lacked jurisdiction of this defendant.

Before commencing a detailed argument upon each of the above five subdivisions, we feel compelled to state candidly that we shall make no attempt to present argument respecting each and all of the findings to which we have assigned error. Plaintiff submitted and the District Court signed thirty-six (36) separate findings of fact. They appear in the record at pages 107 to 140 inclusive. In order to protect our record, we have felt it necessary to assign error to twenty-four (24) of such findings and to three conclusions of law. To even

attempt a detailed discussion of these findings and conclusions, together with the evidence relating thereto would extend this brief beyond conceivable reason. We believe, however, that the various matters assigned as error will be adequately covered in the argument to be presented and we do not intend to waive any assignment of error.

V.

ARGUMENT

- 1. The District Court Lacked Jurisdiction over Appellants and each of Them and over Plaintiff's Alleged Cause of Action Against Appellants for the Reason That Plaintiff Did Not Establish that Any Act or Transaction Constituting a Violation of the Securities Exchange Act of 1934 or any Rule of the Commission Promulgated Thereunder Occurred within the Jurisdiction of the United States District Court for the Western District of Washington.**

Plaintiff has sought to obtain jurisdiction of the United States District Court for the Western District of Washington under and pursuant to Section 10b, Section 27 and Section 29b of the Securities Exchange Act of 1934, together with Rule X-10b -5 as promulgated by the Securities and Exchange Commission. Inasmuch as each of appellants was and is a resident of the State of Oregon, the jurisdiction, if any, therefor, must come within the purport and language of Section 27 of the act and it must be established that an act or transaction constituting a violation of the Securities Exchange Act of 1934 or Rule X 10b-5 occurred within the jurisdiction of the United States District Court for the Western District of Washington.

While it is undisputed that on September 12th, 1949, certain corporate stock of the plaintiff in a loan transaction was turned over to E. R. Errion and sold on the stock exchange, no fraud is alleged or established respecting such transaction. It is not contended that the stock was sold for a lesser value than its market value and in fact the proof is exactly to the contrary.

In point of fact it is not even established in the evidence that this transaction as between E. R. Errion and plaintiff even occurred within the jurisdiction of the United States Court for the Western District of Washington.

Thereafter, in an entirely separate transaction, plaintiff turned over to defendant, Dwight Holdorf, acting for the Holdorf Oyster Corporation the said promissory note and deeds to certain of her properties together with other personal properties (R. 239). None of the properties involved with the possible remote exception of the promissory note could be classified as securities within the meaning of the act.

The very language of the act as analyzed by this court in the case of *Fratt v. Robinson*, 203 F.(2d) 627 (C.A. 9, 1953) indicates that the purpose of the act was to control security transactions by regulation of security-transfer businesses and persons who function in or through them. As this court said in referring to the reasoning of other United States courts, "There is one phase common to the reasoning of all the cases: Section 10 is in aid of the end sought by the act, to-wit, the lessening of fraudulent and sharp practices in the securities market."

Nowhere in the congressional record is there any evidence or even hint that Congress meant to reach such activities as alleged in Plaintiff's complaint. Security transactions on the exchanges and acts directly related thereto were the practices Congress intended to reach by the Securities Exchange Act of 1934.

Not only does Section 10(b) of the act and Rule X-10b-5 thereunder not have the extremely broad application plaintiff believes it does, but its application has been restricted even in matters primarily concerning dealings in securities. *Joseph v. Farnsworth Radio & Television Corp.*, 99 F.Supp. 701 (D.C., S.D., N.Y., 1951), involved the attempt to recover from defendants the difference between what plaintiffs paid for stock in the corporate defendant and that which they would have paid had the defendants not remained mute while selling their stock in the company because of knowledge of its precarious plight. District Judge Sugarman, in dismissing the complaint for failure to state a cause of action, stated:

“Nothing in the history of the Act or the Rule (X-10 (5)-5) permits the far-reaching effect sought herein by the plaintiffs * * * ”

This decision was affirmed in *Joseph v. Farnsworth Radio & Television Corp.*, 198 F.(2d) 883 (2 C.C.A. 1952).

A note on “Purchase of Securities by ‘Any Person’, ” 44 Ill. L. Rev. 841 (1950) concludes that the sanctions of the Exchange Act and Rule X-10b-5 “still apply only to insiders and broker-dealers.”

Plaintiff's complaint alleges that she was the owner of certain properties including corporate securities on

October 19th, 1949, and on that day transferred all of her properties to defendants (R. 6115—Vol. II). Proof of this allegation, of course, failed completely, and even after the trial amendment invited by the trial court (which we felt and do now feel was error) plaintiff did not establish any violation of the act respecting “securities” as defined by the act and which occurred within the jurisdiction of the United States District Court for the Western District of Washington.

Failure to prove an act or transaction occurring within the jurisdiction of the trial court in violation of the Securities Exchange Act of 1934 or the rules of the commission means simply and positively that the court lacked jurisdiction of appellants who were residents of Oregon, and lacked jurisdiction of the subject matter of the action itself.

2. The Relief Sought by Plaintiff Is Predicated Upon the Alleged Damage Occurring to Her by Reason of the Transfer of Her Properties which Transfer Occurred in August, September, and October of 1949. Nothing which Took Place Following October of 1949 Gave Rise to Any Cause of Action, and Plaintiff's Cause of Action, if any, Was Complete Certainly by October 29th, 1949. It Is Barred, Therefore, by the Statute of Limitations.

Since the federal act provides no limitation, the applicable statute of limitations is the statute of the State of Oregon or the statutes of the State of Washington. The applicable Oregon statute of limitations covering relief on the ground of fraud is two years. Oregon Rev. Statutes 12.110.

The applicable Washington statute covering relief predicated upon fraud is three years. Rem. Rev. Stat. Sec. 159 (4).

Each statute provides that the cause of action in such a case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud. Ore. Rev. Stat. 12.110; Rem. Rev. Stat. 159 (4).

Plaintiff's action was not commenced until the filing of her complaint August 31st, 1953, which was almost four years from the time her properties had been transferred.

In the relatively late case of *In re Sackman's Estate*, 34 Wn.(2d) 864, 210 P.(2d) 682, the Washington Supreme Court held that the three-year Washington statute for actions based on fraud begins to run when the fact which, if followed up diligently, would lead to discovery, is in law equivalent to discovery. The court further held that the mere fact that one may have confidence in a relative or relatives (even more applicable to a stranger) does not in and of itself establish a fiduciary relation and is not sufficient to excuse a lack of diligence in investigating to discover fraud.

Plaintiff now contends that the promissory note of September 12th, 1949, was thought by her to be a receipt and not a note. Apparently she discussed her affairs with others and most anyone of even subnormal intelligence could have explained to her what the document was, so too with the other facts relied upon by plaintiff. Any diligence upon her part would have disclosed specific information concerning the oyster lands

around Coos Bay, the title thereto and if necessary, the history of such oyster lands, together with all other facts concerning the transaction.

We respectfully submit that plaintiff's testimony that she did not discover the alleged fraud until some time subsequent to December of 1950 is absolutely incredible.

Assuming the transactions to be fraudulent as contended for by plaintiff, certainly she must in law be deemed to have discovered the fraud prior to August of 1950 (applying the Washington statute) and beyond any question of doubt, prior to August of 1951 (applying the Oregon statute).

This action as against each and all of appellants is barred by the statute of limitations.

In this connection it is worthy of note that the District Court in finding No. 28 (R. 134, Vol. II) merely recites that plaintiff did not discover or have any reason to discover facts that revealed to her that she had been defrauded until well within three years from the time she commenced the action. This finding is not only not supported by the evidence, but is insufficient to sustain the judgment.

3. The Judgment of February 17th, 1955, As to Each of Appellants Is Not and the Respective Findings of Fact As to Each of the Appellants Are Not Supported by the Evidence.

Plaintiff's action for relief is upon the ground of fraud and the Washington and Oregon law relative to common law fraud is applicable.

The fact that plaintiff has endeavored to invoke the

jurisdiction of the federal courts pursuant to the Securities Exchange Act of 1934 does not change the nature of her action. The action is one for relief predicated upon common law fraud and this court has so held in the case of *Fratt v. Robinson*, 203 F.(2d) 627 (C.A. 9, 1953). In that case appellees contended that the two-year statute of limitations applied, in that the action arose out of a statute. In answering that contention this court said:

“In a sense, of course, the instant action is based upon a statute, but it is also based upon fraud which has been the subject of common law concern through the centuries. And, of course, the Washington state law recognizes such an action. The authors of 53 C.J.S., Limitations of Actions, Sect. 83 (a), at page 1052, have deduced the following from the authorities:

“ * * *

“ ‘The phrase “liability created by statute” or “liability created by law,” within the meaning of such a statute, has been held not to include or extend to actions arising under the common law,
* * * .’

“Appellees argue that the basis of the federal statute is the use of the mails or other instrumentality of interstate commerce, therefore the action arises from a statute and the two-year limitation applies. But, of course, the use of the mails *per se* is not denounced, it is the fraud that offends. For that reason, it denies the use of the mails in connection with the fraud. Here is not a governmental statutory denouncement of a human action heretofore undenounced, such as a violation of a wartime price for a commodity. Fraud is denounced in all its phases by federal and state and the common

law. There are statutes with restrictions and limitations as to actions under it, but such actions do not arise out of nor upon a statute, within the meaning of the Washington state law. To hold otherwise would be paying tribute to form inconsistent with the spirit and substance of the rule.

“What we have said appears to be borne out by the Washington State Supreme Court in the case of *Union Trust Co. v. Amery*, 1912, 67 Wash. 1, 120 P. 539, 540. That action was based upon a Washington statute which declared unlawful, among other acts, the making of any division of the stock of a corporation except from profits. It was claimed by defendants that the statute of limitations had run. The court thought otherwise, and held the applicable limitation was that provided for actions based upon fraud.”

In *Melton v. United Retail Merchants*, 24 Wn.(2d) 145, 163 P.(2d) 619, the Supreme Court of the State of Washington said:

“If there be such presumptions as are relied on by respondent, which we gravely doubt, they must certainly give way to the ancient and familiar rule—or rather, maxim, for it is so classified in the law books—that: ‘Fraud is never presumed, but must be proved.’ The Roman version is perhaps the better, for in two less words, it not only states the maxim, but also the reason on which it is based ‘*Fraus est odiosa et non pro sumenda*’ (Fraud is odious and not to be presumed).

“It follows from the rule that fraud will not be presumed that the burden of proving fraud rests on the party who relies on it either for the purpose of attack or defense.

“The rules which impose the burden of proof

on one alleging fraud and which deny a presumption of fraud rest on the fact that fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith. The presumption is against the existence of fraud and in favor of innocence, *the presumption against fraud approximating in strength the presumption of innocence of crime* * * * (Emphasis supplied by the court) 37 C.J.S. 398, Fraud, Sec. 95."

In *Cerckonek v. Dibble*, 42 Wn.(2d) 451, 256 P.(2d) 488, the Washington Supreme Court said:

"And we have repeatedly held that the burden is upon the person who alleges fraud to establish it by evidence that is clear, cogent and convincing." (Citing cases.)

The Oregon rule is almost identical. See *Miller et ux. v. Protrka, et ux.*, 193 Ore. 585, 238 P.(2d) 753, together with the case of *Metropolitan Casualty Insurance Co. v. Leshner*, 152 Ore. 161, 52 P.(2d) 1133, wherein many Oregon decisions on the burden of proof in fraud cases are reviewed and the court quoted from the case of *Wimer v. Smith*, 22 Ore. 469, 30 Pac. 416, as follows:

"On a charge of fraud, the burden of proof is on the party alleging it. The defendants must clearly and distinctly prove the fraud or false representations they allege. The law in no case presumes fraud. The presumption is always in favor of innocence, and not guilt. Fraud must be proved, but it may be proved by circumstances from which no other inference but that of fraud can be drawn.

The rule is, that when proven by circumstances, they must afford a strong presumption. (*Juzan v. Toulmin*, 9 Ala. 662; S.C. 44 Am. Dec. 448.) Circumstances of mere suspicion will not warrant the conclusion of fraud. (*Taylor v. Fleet*, 4 Barb. 95; *Clarke v. White*, 12 Pet. 178.) 'The evidence of it,' Chancellor Kent said, 'must be clear, strong, and satisfactory.' (*Boyd v. Mclean*, 1 John's Ch. 582; *Gillespie v. Moon*, 2 id. 585.) And so likewise said the learned and eminent Dillon J., in *Geib v. Ins. Co.*, 1 Dill, C.C. 443. In no doubtful manner does the court lean to the conclusion of fraud; it is not to be assumed on doubtful evidence. If the fraud is not clearly and strictly proved as alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. (*Mowatt v. Blake*, 31 L.T. 387.) The facts constituting fraud must be clearly and conclusively be proved by the preponderance of the testimony * * * '' (Citing texts)

The leading Washington decision upon the necessary elements of fraud is *Webster v. Romano Engineering Corp.*, 178 Wash. 118, 34 P.(2d) 428 which has been cited with approval in numerous later Washington decisions including the case of *Dobbin v. Pacific Coast Coal Co.*, 25 Wn.(2d) 190, 170 P.(2d) 642, wherein the court said:

"Of all civil liabilities, fraud is the most difficult to establish."

The Oregon rule is identical. See *Counzelmann v. N.W.P. & D. Prod. Co.*, 190 Or. 332, 225 P.(2d) 757, and *Musgrave et ux. v. Lucas et ux.*, 193 Or. 401, 238 P.(2d) 780.

With the foregoing principles of law in mind, let us

briefly examine the evidence in support of the judgment and the several findings as to each of the appellants.

(A) *Evidence as to Amy Errion.*

The only evidence as to Amy Errion consists in Mrs. Connell's testimony that Amy was present in her home on numerous occasions and did some typing for her in connection with her business (denied by Amy Errion); that Amy Errion accompanied Mrs. Connell to California in 1950 which is undisputed (there is not one word in the testimony which would give rise to any inference therefrom); that Amy Errion sold Mrs. Connell's corporate securities in September of 1949 (which related solely to the separate and distinct promissory note transaction); and the fact that she was the wife of E. R. Errion. The latter fact seems to have been of primary importance to the trial court in his decision as appears on page 1072 of the record.

It will be readily seen that none of the testimony relating to Amy Errion comes with the rulings of the Washington and Oregon courts insofar as fraud actions are concerned.

(B) *C. W. Williamson*

The only testimony relating to appellant, Williamson, is in connection with the lease of December, 1950. There is no showing whatsoever that he had any knowledge of the transfer of plaintiff's properties to anyone, or that he had any connection whatsoever with any of the matters testified to by plaintiff until more than a year after all of the properties had been transferred.

As we have previously stated the gravamen of plaintiff's action is fraud in inducing her to transfer her properties in the fall of 1949, and once again, it is exactly contrary to the rules as established by the Washington and Oregon courts to hold appellant, Williamson, liable in this action.

(C) *Violet Kellerstrauss*

Violet Kellerstrauss is the sister of E. R. Errion. Her apartment adjoins his in Portland. For a time they had a joint bank account and at the request of defendant, Holdorf, the title to one of the properties originally belonging to plaintiff was placed in Violet Kellerstrauss' name and later sold by her. The actual sale took place in 1953.

Once again, unless we are to presume fraud and to ignore the requirements as established by the courts of both Washington and Oregon, we cannot find Violet Kellerstrauss guilty of fraud in this action. There is not one word of testimony that she had any part or knowledge in inducing plaintiff to dispose of her properties in the slightest particular.

(D) *E. R. Errion*

If this judgment is to be sustained against appellant, E. R. Errion, it must necessarily be upon the testimony of plaintiff and the testimony of defendant, Dwight Holdorf. The testimony of neither was "clear, cogent and convincing."

Despite her studied endeavor at the time of trial to place the entire blame for anything which occurred upon defendant, Errion, we respectfully submit that

her testimony falls far short of the required clarity and credibility in that she was impeached on almost every important item of her testimony.

The court will recall that plaintiff testified upon an earlier deposition in another action that her entire dealings were with the Holdorf Oyster Corporation and Dwight Holdorf with the exception of one transaction with Errion wherein she loaned him some twenty-four-odd thousand dollars and took his promissory note for it (R. 204-211). Obviously this is the corporate stock loan transaction in August and September of 1949 and under plaintiff's testimony alone the judgment cannot be supported against Errion.

Dwight Holdorf's testimony is even less convincing. In the trial of a very considerable number of civil cases over the past twenty years, the writer of this brief does not recall ever observing a witness who was more completely impeached than was defendant Dwight Holdorf. In order to save the time of the court in a trial which had already been unduly extended, and by stipulation of counsel, we merely read from his deposition the impeaching statements made by him at that time and did not follow the usual procedure of reading each statement and then asking the witness if he so testified. Notwithstanding this, however, 49 pages of the record consist of this impeaching testimony (R. 873-922).

It is clearly apparent by now, that from the commencement of this action plaintiff has made a studied and deliberate effort to vilify defendant E. R. Errion, commencing with the language used throughout her complaint, the numerous affidavits filed during the

pendency of the action, and in a deliberate attempt throughout the trial of plaintiff and her witnesses to place the entire blame upon him. This animosity is clearly indicated by the witness Bynon, who testified that she worked for Mr. Errion for some six months, left his employ at 3:00 o'clock in the afternoon of a given day in June of 1949 and met with representatives of the Attorney General's office immediately thereafter (R. 395).

Despite all of this and as previously stated, the judgment against E. R. Errion must rest upon the testimony of plaintiff and defendant Dwight Holdorf. The character of that testimony is not such as to sustain this judgment.

A further ground for reversal of the judgment as against each and every one of the appellants is the situation which, by plaintiff's own testimony and pleadings puts her in *pari-delicto* with at least one of the appellants. The undisputed testimony is that plaintiff and E. R. Errion attempted to "fix" the value of Coos Bay oyster lands in an admitted attempt to defraud the Port of Coos Bay out of \$150,000.00. When we say undisputed testimony we mean in this connection the testimony of Mrs. Connell, if taken at its face value. She testified that she expected to receive a profit on this transaction. We submit therefore that the case of *Paddock v. Todd*, 37 Wn.(2d) 711, 225 P.(2d) 876, is directly in point. In that case the Washington court said:

"Concerning respondent's cross-appeal, little need be said. It is very clear that the trial court, in exercise of its equitable powers, was entirely correct in refusing respondent any relief upon his

cross-complaint for the reason that both appellant and respondent knowingly entered into a conspiracy to obtain money from Anacortes Veneer, Inc., by falsely representing that appellant was a bona fide stockholder and, as such, entitled to employment under the rules and regulations of the company. *Under these circumstances, the parties being in pari delicto, a court of equity will not aid either party in carrying out their fraudulent conspiracy.* 2 Pomeroy's Equity Jurisprudence (5th ed.) 134, Sect. 402f."

4. It Was a Grievous and Material Abuse of Discretion for the District Court to Deny to Appellants and Particularly to Appellant, E. R. Errion, the Motion for Vacation of the Trial Setting and for a Continuance.

As we previously indicated, plaintiff, her witnesses and defendant Holdorf, acted in concert together throughout the trial to place the entire onus and blame upon the defendant E. R. Errion.

E. R. Errion was the only witness who could testify in his own behalf. His absence from the trial was testified to by Dr. Herman A. Dickel whose testimony was unimpeached and uncontroverted. Timely motions were made for continuance prior to trial at the commencement and at the conclusion of the trial, and it was an abuse of discretion for the court to deny these motions.

In *Harran, et al. v. Morgenthau*, 89 F.(2d) 863 (App. D.C. 1937), the Federal court said:

"If there were anything in this record challenging the good faith of the motion for continuance, the professional ability or character or truthfulness of the physicians who made affidavit to the

inability of Dunning to appear or even if there were a showing that a continuance would have resulted in serious loss to the other parties, we should not now hesitate to sustain the action of the lower court; but here we are confronted with a case in which, as appears, the plaintiff was his only witness and was so seriously ill that his appearance in court would probably have resulted in his death. Insisting upon a trial in these circumstances must necessarily have resulted in prejudice to Dunning's rights. There may have been good reasons for the refusal to grant the continuance, but if there were it was the duty of counsel to have shown them by the record, for we can know only what the record contains.

"We believe the universal rule in circumstances such as we have outlined above is to reverse the judgment or decree and remand the case for a new trial. Cases so holding, among others too numerous to mention are the following:" (Citing cases)

See also *Elliott v. Lawson*, 87 Ore. 450, 170 Pac. 925; *In re Townsend's Estate*, 122 Ia. 246, 97 N.W. 1108; *McCutcheon's Adm'r. v. Dean*, 246 Ky. 257, 54 S.W. (2d) 926; *Karkorian v. Fermanian*, 189 N.Y.S. 130, and *State v. Harras*, 22 Wash. 57, 60 Pac. 58. In the latter case, though upon a different set of facts, the language of the court is particularly important. The Washington Supreme Court said:

"If the defendant has been deprived of the right to make a defense through no failure or neglect of his own, it would be a shame and a reproach to the law to hold him accountable for the law's mistake. The case involves something more than a mere question of the exercise of discretion by the trial judge in refusing an application for a continu-

ance. It involves the larger question of a defendant's right to have witnesses examined in his behalf. It involves the constitutional right of fair trial. No duty which the courts owe society can rise above that of preserving inviolate those principles which make effective the constitutional guarantee of a fair trial. Better, far better, that the course of justice be slow, than that in making haste we should break down those safeguards which experience has shown to be necessary for the welfare and protection of the rights of the citizen."

5. No Proper Service Was Had Upon Defendant Violet Kellerstrauss and the Court Therefore Lacked Jurisdiction over Her Person.

Plaintiff sought to obtain jurisdiction over defendant Violet Kellerstrauss, by an affidavit setting forth personal service upon her in Portland, Oregon. This affidavit being controverted and the court having taken oral testimony in relation thereto, it clearly and unequivocally appeared that the affidavit was false in all particulars, and that no personal or proper substituted service was had upon this defendant.

For this reason and regardless of everything else said in this brief respecting defendant Violet Kellerstrauss, the judgment against her must be reversed by reason of the lack of competent service.

CONCLUSION

We respectfully submit that the court lacked jurisdiction over these defendants and this cause of action; that the action was not commenced within the time limited by law; that the evidence wholly fails to support the judgment and the findings of fact as to each of the appellants; that the court abused its discretion in denying the motion for vacation of trial setting and for a continuance; and that the court lacked personal jurisdiction over defendant Violet Kellerstrauss.

For the reasons above set forth in this brief, the judgment should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES AND RULE INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sect. 78j(b), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules, and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule X-10B-5 promulgated by the Commission under Section 10(b), 17 C.F.R. Sect. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 27 of the Act, 15 U.S.C. Sect. 78aa, provides:

The district courts of the United States, the Supreme Court of the District of Columbia, and the United States Courts of any Territory or other places subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Section 29(b) of the Act, 15 U.S.C. Sect. 78cc(b), provides:

Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as

regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: * * *



UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARGUERITE L. CONNELL,

Plaintiff - Appellee,

-vs-

EDGAR ROBERT ERRION, also known as E. R. Errion
and Bob Errion, AMY ERRION, VIOLET KELLERSTRASS
and C. W. WILLIAMSON,

Defendants - Appellants,

DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER
CORPORATION, a Washington Corporation, INAR
GLASER, DOROTHY GLASER, KATHERINE GOLD, H. A.
DAVENPORT, also known as Lee Davenport, CORA
SCOTT, et al,

Defendants.

Appeal from the United States District
Court, Western District of Washington,
Northern Division

BRIEF OF APPELEE

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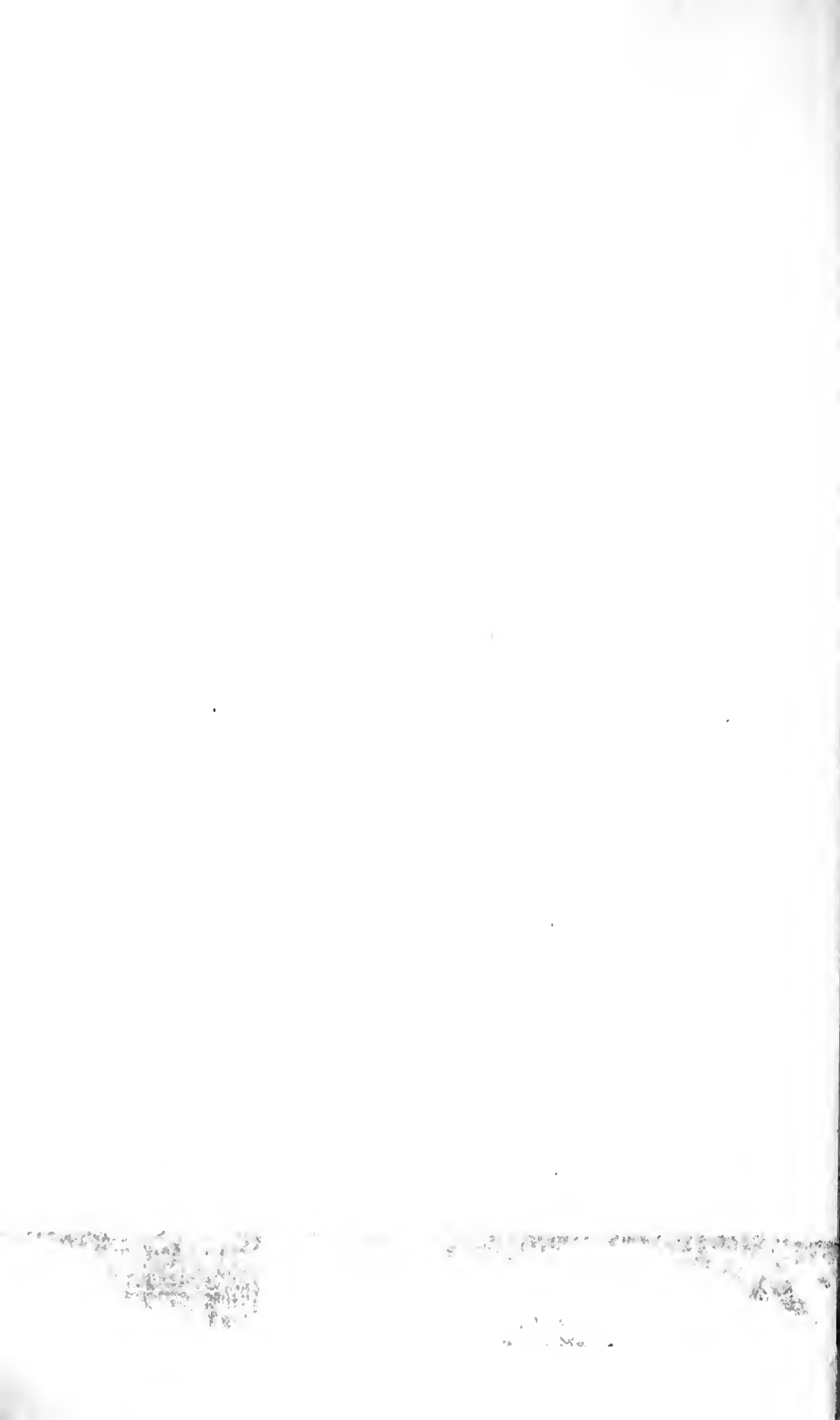
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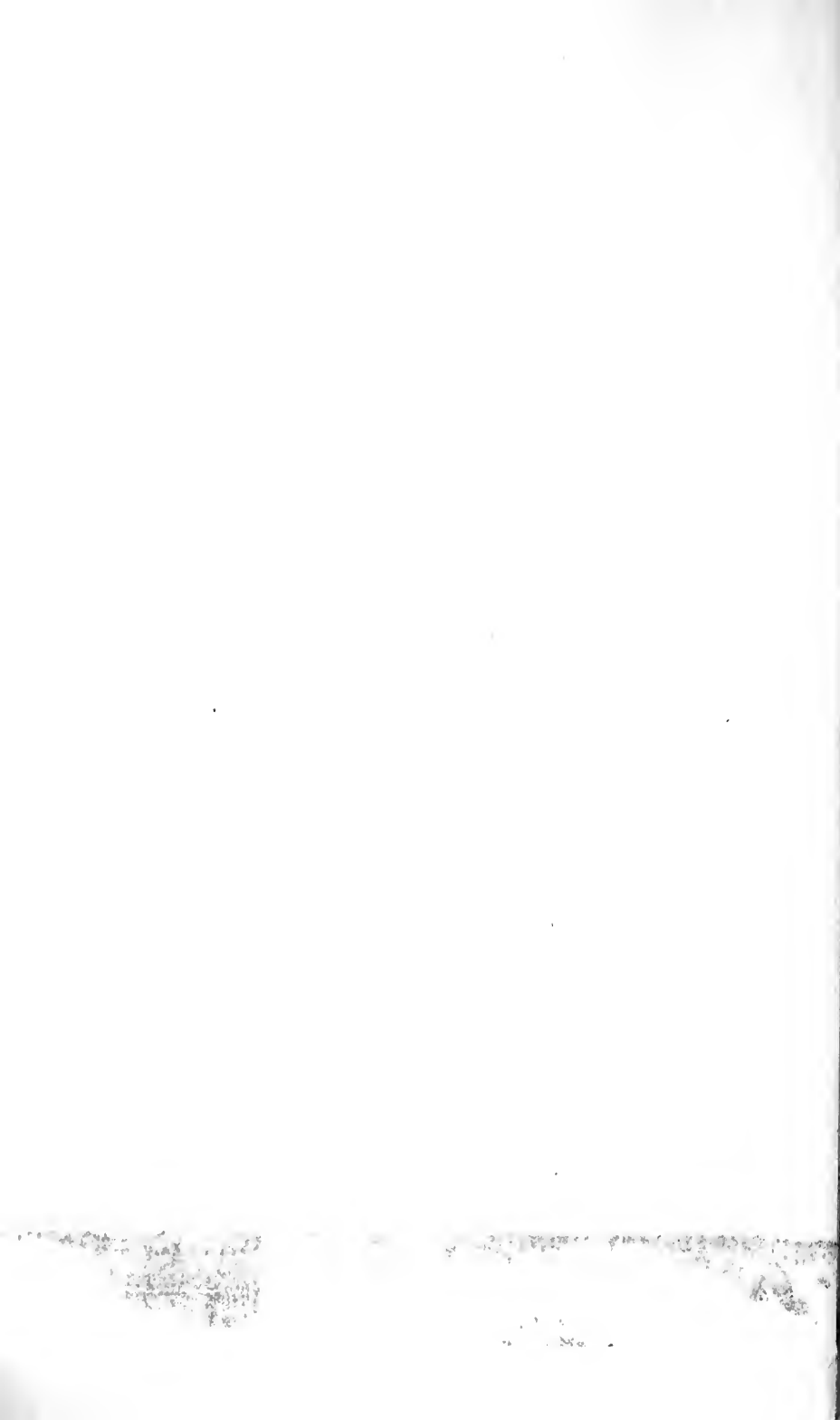
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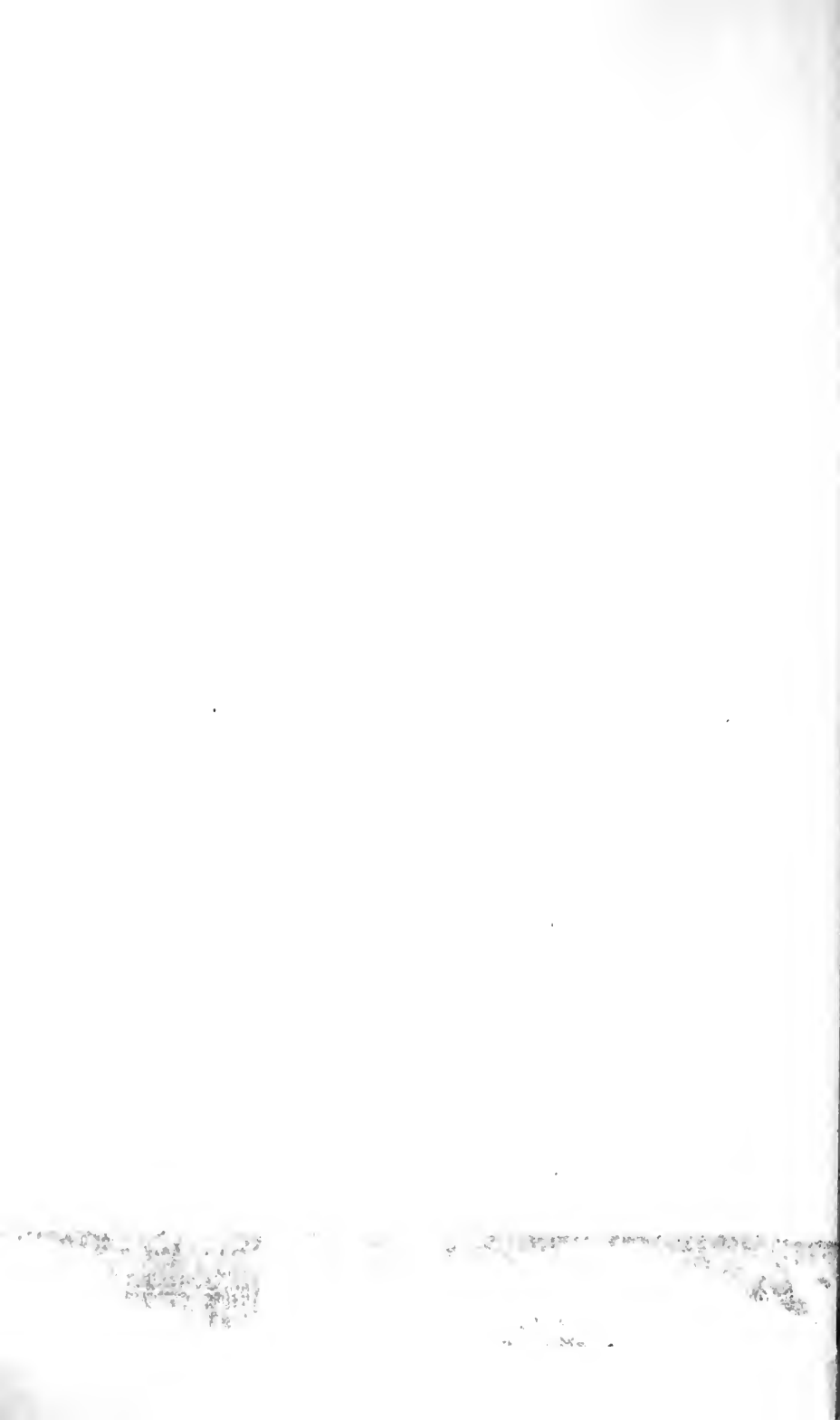
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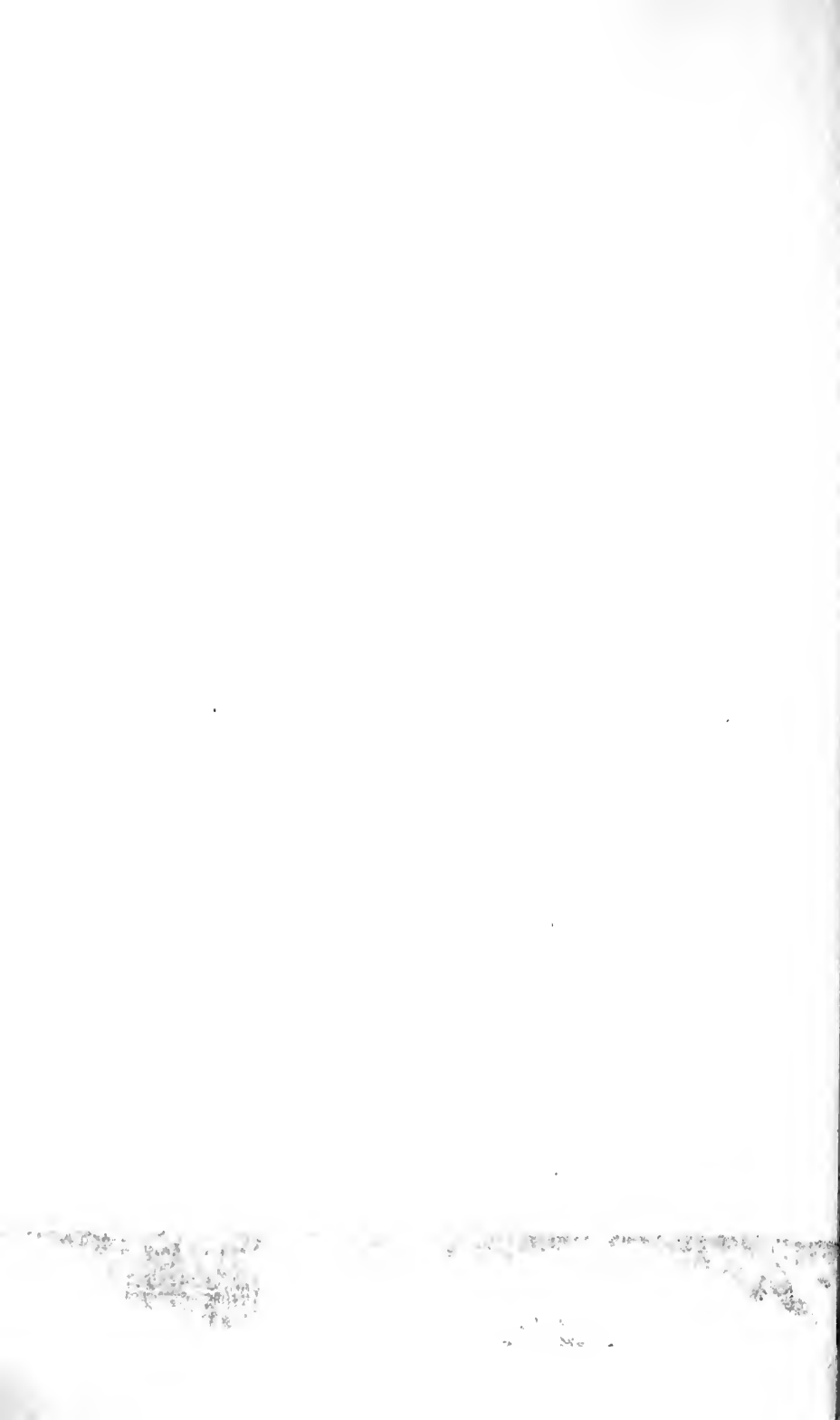
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STATUTES

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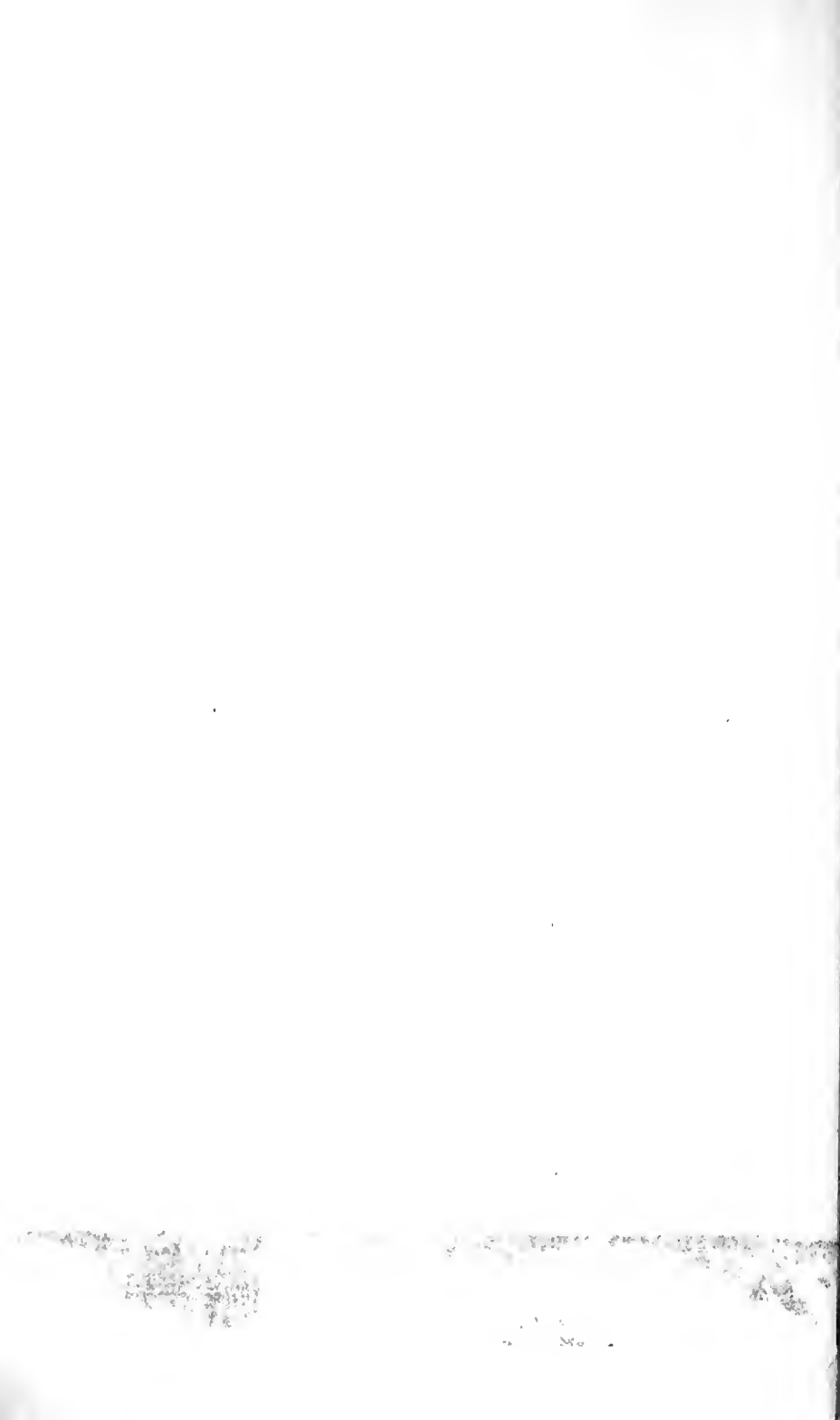
BRIEF OF APPELLEE

Because Appellants devoted their "Statement of the Case" more to the chronological events of the litigation than to the facts upon which the Court found that they had conspired to perpetrate a scheme upon Appellee to fraudulently induce her to sell to them \$124,180.09 worth of securities and other property for a deed to 125 acres of almost worthless tideland in Coos Bay, Ore., Appellee believes it appropriate to make her own "Statement of the Case". Appellee (hereafter called Mrs. Connell) is here defending the \$83,077.49 judgment which the Court below awarded to her on January 17, 1955. (T. 140, Vol 2)

APPELLEE'S STATEMENT OF THE CASE

The trial Court found that Appellants (together with non-appealing defendants) conspired with each other in the perpetration of a fraudulent scheme upon Mrs. Connell in violation of Sec. 10(b) of the Securities and Exchange Act of 1934 (15 USC Sec. 78j(b)) and Rule X-10B-5 of the Securities and Exchange Commission (17 C.F.R. Sec. 240.10b-5). (T. 135, Vol. 2)

Here is a concise statement of the facts that constituted the scheme:



THE SCHEME -- Its Conspirators and Victim

Mrs. Connell was the victim. She resides in Seattle, Washington and has been a widow since 1946.

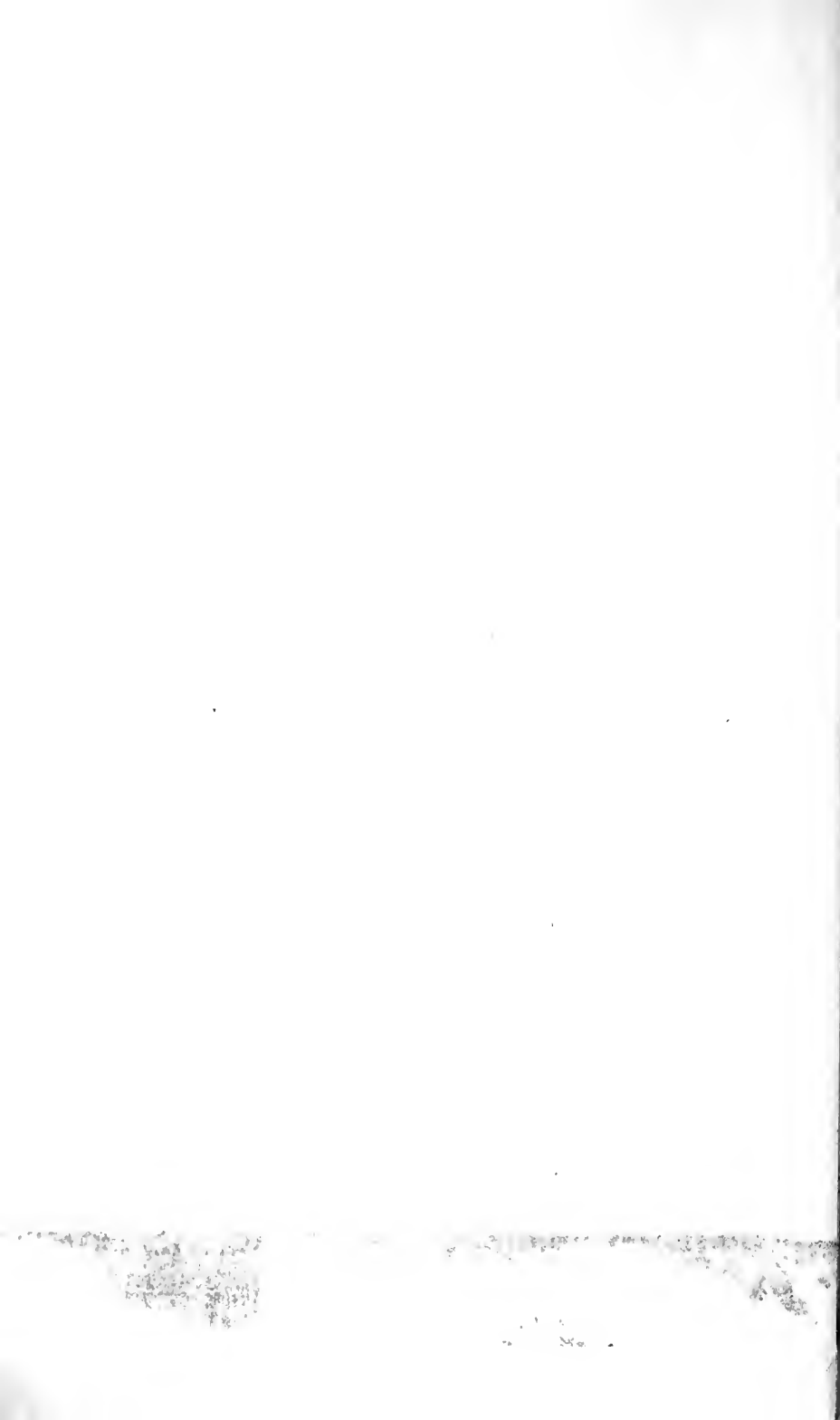
In 1949 she was 74 years of age. She is now eighty.

Appellant conspirators include: E. R. Errion (hereinafter called "Errion"), a little over 50 years of age and a resident of Independence and/or Portland, Oregon. Errion's wife, Amy Errion, likewise is an Oregon resident. Violet Kellerstrass , a 41 year old unmarried sister of E. R. Errion is a resident of Portland, Oregon. C. W. Williamson resides in Salem, Oregon.

The other conspirators were the defendants who have not appealed from this judgment, namely: Dwight Holdorf and his wife, Opal Holdorf, who spent considerable time in Oregon but were residents of Washington, and the Holdorf Oyster Corporation, organized under the laws of the State of Washington.

THE SCHEME -- Its Inducement Phase

In the early part of 1949 Mrs. Connell first met Errion when he called at her Seattle home at the instance of a Mr. Davenport whom Mrs. Connell had met in Portland during the Christmas holidays of 1948. At that time Errion called to see if he could help her sell her two large homes in Seattle of which she was anxious to dispose. (T. 106).



Several months later in the early summer of 1949, Errion again called at Mrs. Connell's home and presented to her a "plan" which later developed into a sale of her securities and other property valued at \$124,180.00 to Errion in exchange for 125 acres of tidelands in Coos Bay, Ore. The so-called "plan" was represented to Mrs. Connell in the following general respect:

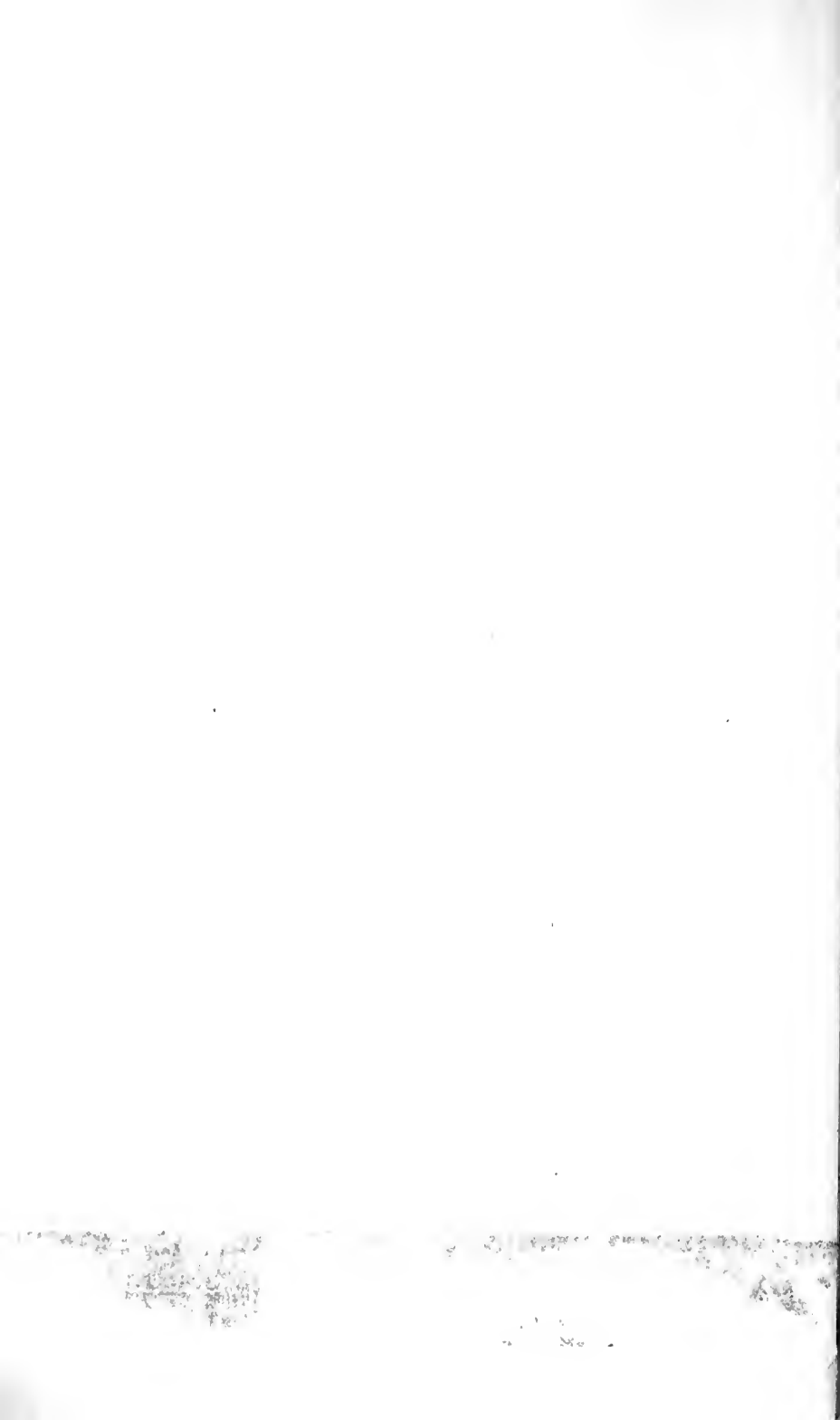
Errion said he had large holdings of "Oyster" land in Coos Bay, Ore.; that he had held them for a long time and that they were worth \$2,000.00 but more conservatively \$1,200.00 per acre. (T. 110) He said that in the Fall of 1949 it was expected that the Port of Coos Bay would condemn his holdings of "Oyster" land and that it was necessary for him to 'establish values' of said land by selling some of it to others before the condemnation action was commenced (T. 112). Errion further explained that the "establishment of values" was particularly necessary because although the land was well worth \$1,200.00 per acre, there had been so few sales of such land that its true value couldn't be established unless he sold some of it at its true value prior to commencement of condemnation. The "plan" of Errion was for Mrs. Connell to sell to him all of her securities and other property for the "Oyster" land valued at \$1,200.00 per acre - representing \$150,000.00 in exchange for her securities and other properties worth \$124,180.09 and such would be conclusive evidence estab-



lishing the true value of the "Oyster" land at \$1,200.00 per acre. Errion pointed out that the transaction would also establish the true value of the adjacent "Oyster" land holdings of his own and that as a result, he as well as Mrs. Connell would benefit. (T. 112).

When Mrs. Connell remonstrated about acquiring any kind of land or entering into any kind of a business - much less the "Oyster" business - Errion represented that because the Port of Coos Bay would shortly be condemning the land for Port expansion which land the Port sorely needed, it would be required to purchase this "Oyster" land for the value as established at \$1,200.00 per acre with the consequence that within the year Mrs. Connell would, if she purchased the "Oyster" land which she didn't want, end up with \$150,000.00 in cash which she did want. (T. 109).

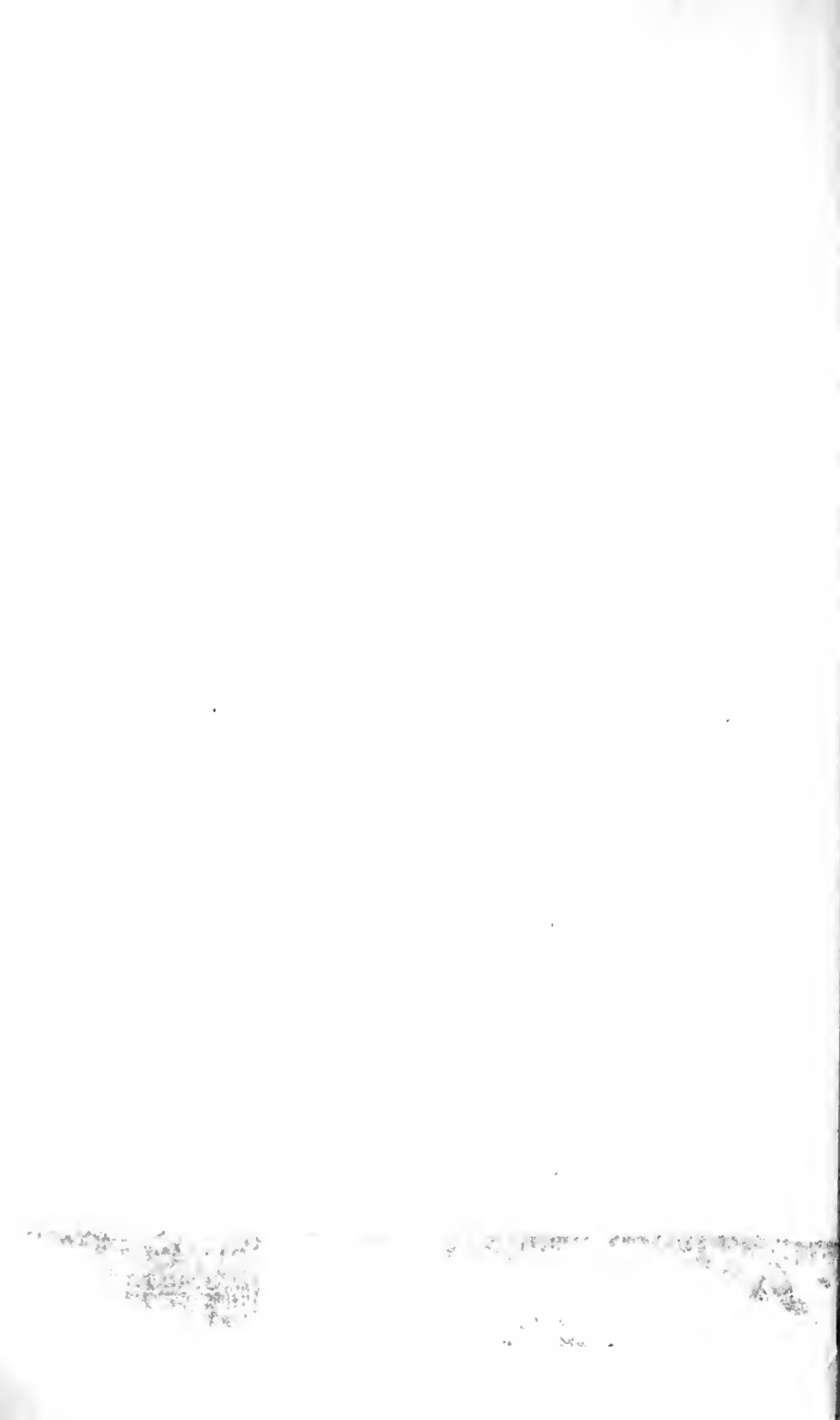
In presenting this so-called "plan" as part of the fraudulent scheme, Errion made several untrue statements of material facts (T. 118, Vol. 2); made untrue representations as to the future as well as promises which at the time they were made were not intended to be kept (T. 120, Vol. 2); and omitted to state material facts necessary in order to make the statements made to Mrs. Connell, in the light of the circumstances under which they were made, not misleading. (T. 121, Vol. 2)



THE SCHEME -- Its principal transaction

Relying upon the misrepresentations, false promises and misleading statements of fact, Mrs. Connell between August 22, 1949 and October 19, 1949 sold the following securities and other property, having a total value of \$124,180.09 in exchange for a deed to 125 acres of tidelands in Coos Bay, Oreg. worth not more than \$12,500.00 (T. 110, Vol. 2):

- | | | |
|-----|---|-------------|
| (a) | 54 shares, California Packing Corporation | |
| | 195 shares, The Borden Company | |
| | 92 shares, Standard Oil of California | |
| | 25 shares, General Motors Corporation | |
| | 60 shares, Portland General Electric | |
| | 50 shares, State Street Investment Co. | |
| | 500 shares, Affiliated Funds | |
| | Total value | \$24,624.11 |
| (b) | Earned but unpaid dividends in cash on above securities at time of sale - | 122.61 |
| (c) | The "Kalland" promissory note (maturity exceeding nine months) unpaid balance and value | 915.30 |
| (d) | Annuity insurance policy having face value of \$30,000.00 but an actual value at time of sale | 25,000.00 |
| (e) | The "Bogardus" contract, being a conditional sales contract of real property in Seattle, Washington held by Mrs. Connell and having at time of sale an unpaid amount and value of | 3,023.03 |
| (f) | The "Rankin" contract, being a conditional sales contract upon real estate in Seattle, Washington held by Mrs. Connell and having an unpaid balance and value of | 7,955.71 |



(g) The "Johnson" contract, being a conditional sales contract on real estate in Seattle, Washington held by Mrs. Connell and having an unpaid balance and value of 640.00

(h) Mrs. Connell's home at 2812 Mt. St. Helens Place, Seattle, Washington, value 45,000.00

(i) Improved residential property at 811 14th Avenue North, Seattle, Wash. of a value of \$25,000.00 but incumbered with a first mortgage having an existing unpaid balance of \$3,106.22 and an equity at time of sale of 16,893.78

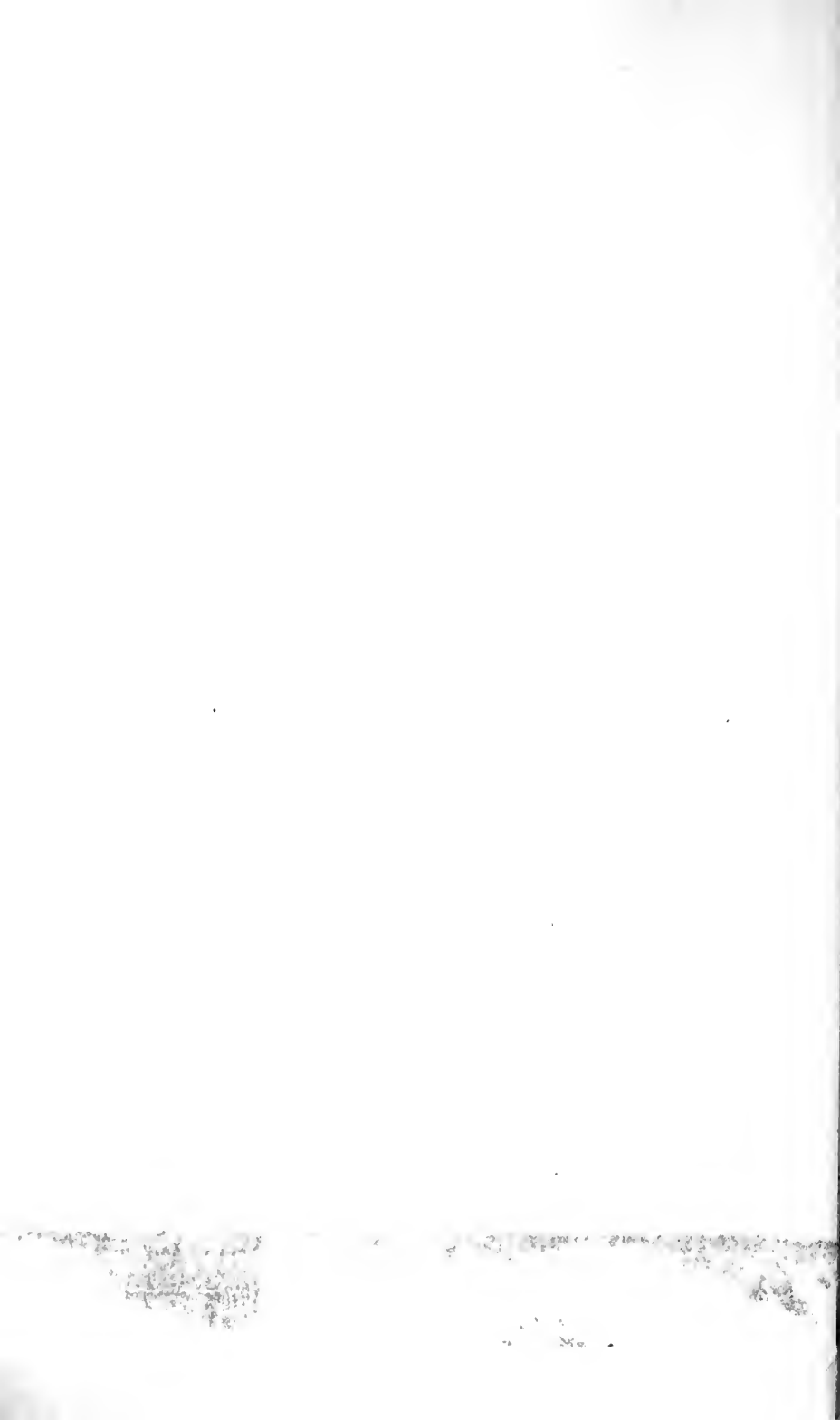
TOTAL \$124,130.09

Mrs. Connell at all times understood that she was engaged in a single transaction with Errion wherein she was selling her above described securities and other property to Errion in exchange for 125 acres of oyster land in Coos Bay, Ore. valued at \$1,200.00 per acre and she relied upon Errion to so effect such transaction.

This transaction was consummated in the following manner and under the direction of Errion but with the participation and assistance of Amy Errion, Dwight Holdorf, Opal Holdorf and Holdorf Oyster Corporation. (T. 112, Vol. 2).

First, on August 22, 1949 Mrs. Connell deeded her two parcels of residential property in Seattle, Wash. to Dwight and Opal Holdorf. (Ex. 42).

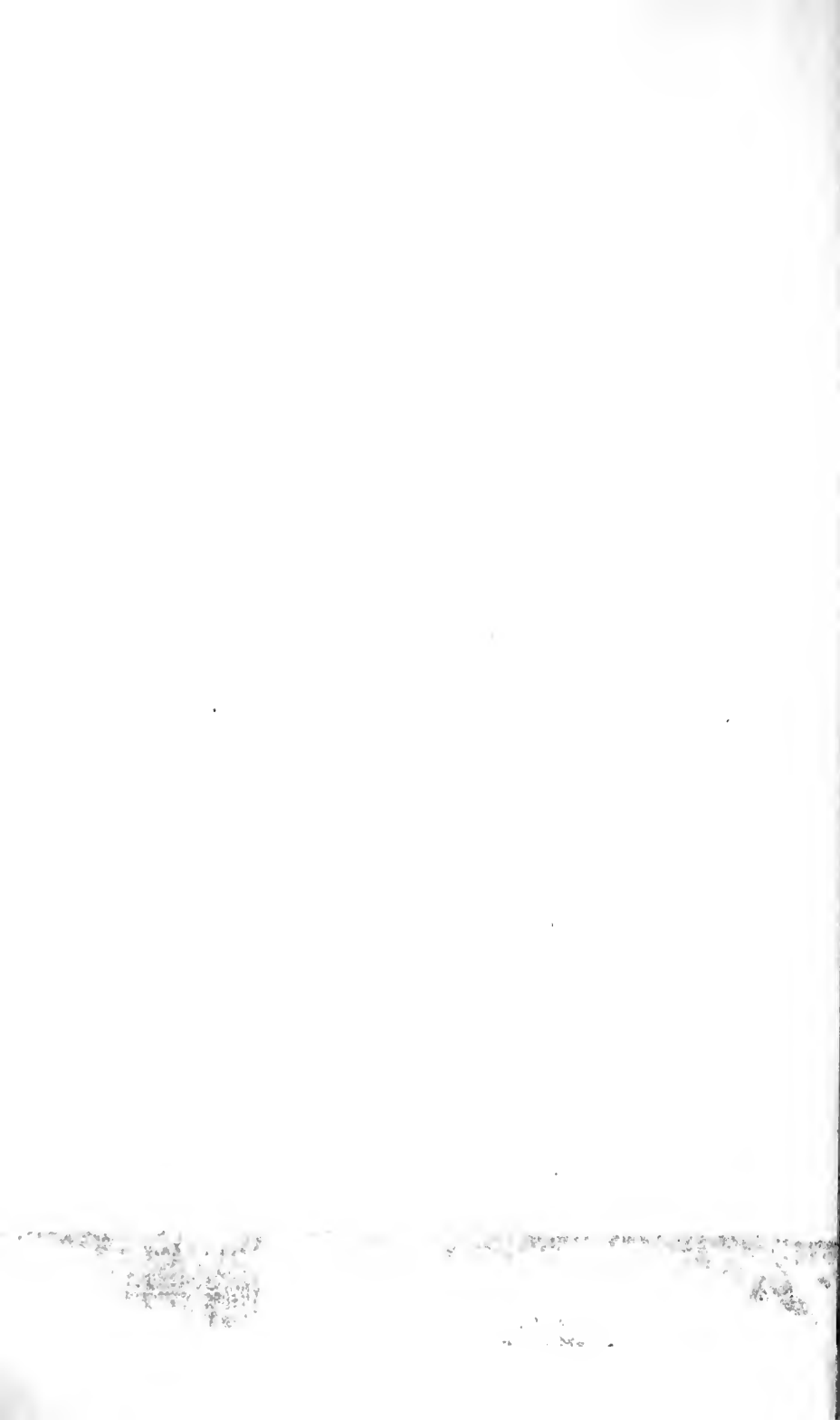
Second, on September 3, 1949 Mrs. Connell delivered to Errion the above listed corporate securities



whereupon Amy Errion with written consent of Errion sold such securities on her own account at Merrill, Lynch, Fenner & Beane at Seattle Wash., giving the proceeds to her husband and keeping for herself a subsequent \$122.61 dividend check. (T. 94, 97, Ex. 65, 66, 67). On September 12, 1949 Errion gave to Mrs. Connell his one year promissory note in amount of \$24,624.11 which Mrs. Connell considered and treated as a receipt for the shares of corporate stock, pending delivery to her of the promised "Oyster" land.

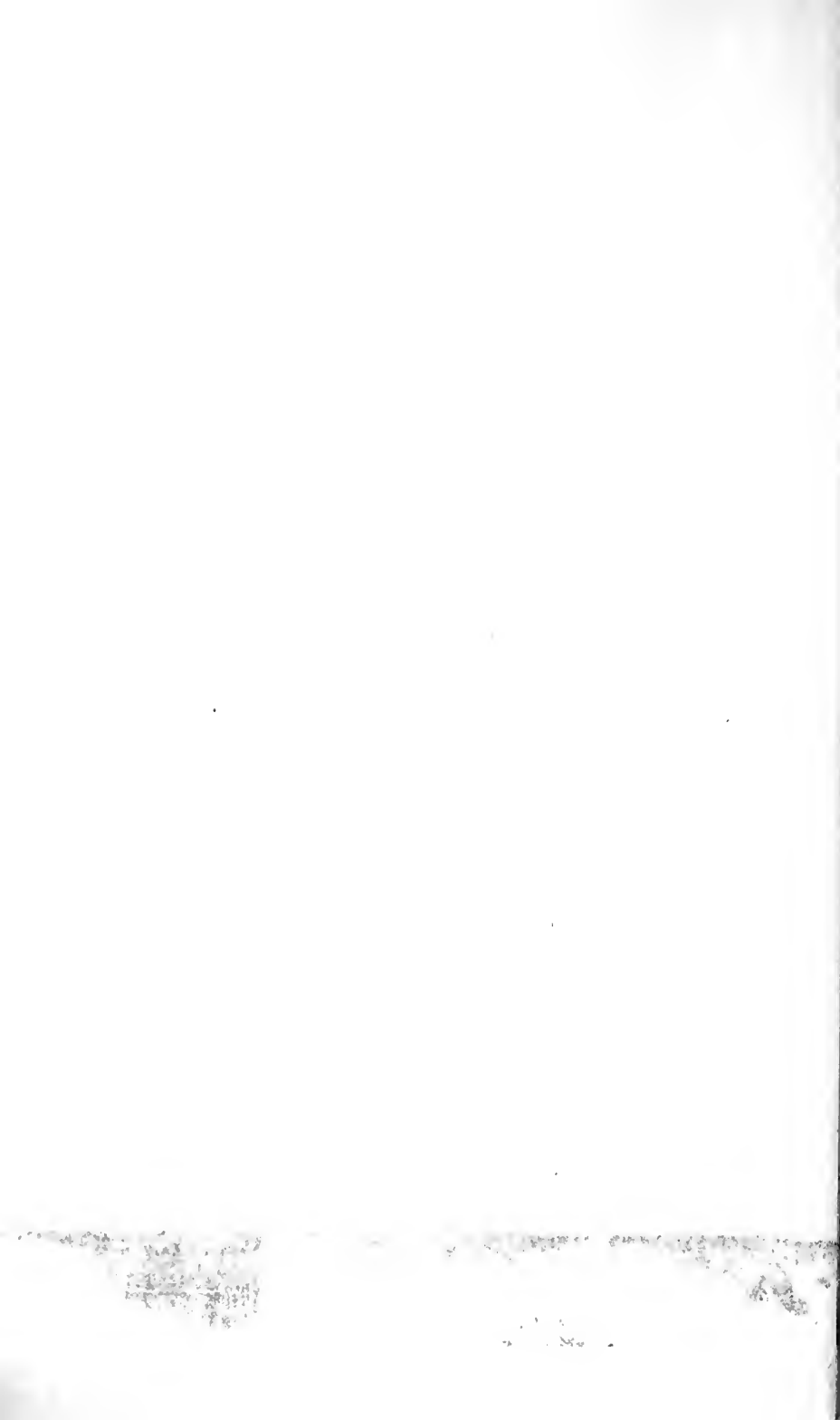
Third, between August 22, and October 19, 1949 Mrs. Connell transferred the "Kalland" note (maturity exceeding nine months); the annuity insurance policy; the three conditional sales contracts upon real property in Seattle to the Holdorf Oyster Corporation. (Ex. A-5).

Fourth, on October 19, 1949 Dwight Holdorf presented to Mrs. Connell a receipt document dated at "Seattle, Washington" (Exh. A-5) receipting for all of the above described securities and property, excluding the described corporate securities but including the promissory note of Errion in amount of \$24,624.11, dated September 12, 1949 for and in consideration of a deed to 125 acres of land in Coos Bay, Ore. The receipt document was signed by the Holdorf Oyster Corporation and by Mrs. Connell. This transaction took place in Mrs. Connell's Seattle home (T. 114, Vol. 2). At this



time Dwight Holdorf received from Mrs. Connell the promissory note of Errion dated September 12, 1949 in amount of \$24,624.11, endorsed in blank by Mrs. Connell, together with a second set of deeds to Mrs. Connell's two parcels of residential property naming the Holdorf Oyster Corporation the grantee in each. (Mrs. Connell's deeds on August 22, 1949 had named Dwight Holdorf and Opal Holdorf as grantees). Also, at this time Mrs. Connell received a deed from Holdorf Oyster Corporation to 125 acres of "Oyster" land in Coos Bay, Ore. (Ex. 1)

The Court below not only found that Errion, Amy Errion, Dwight Holdorf and Opal Holdorf each and all knew of the transaction and that its purpose was to defraud Mrs. Connell but also found that there was only one single and indivisible transaction involving the purchase from Mrs. Connell of \$124,130.09 worth of her securities and other property for a consideration of \$12,500.00 worth of land in Coos Bay, Ore., although as part of the scheme to defraud Mrs. Connell, an attempt was made by Errion and Dwight Holdorf to make the transaction appear on paper as several transactions by use of documents prepared by either Errion or Dwight Holdorf and presented to Mrs. Connell at various times over a six-week period by either Errion or Dwight Holdorf. (T. 114, Vol. 2).

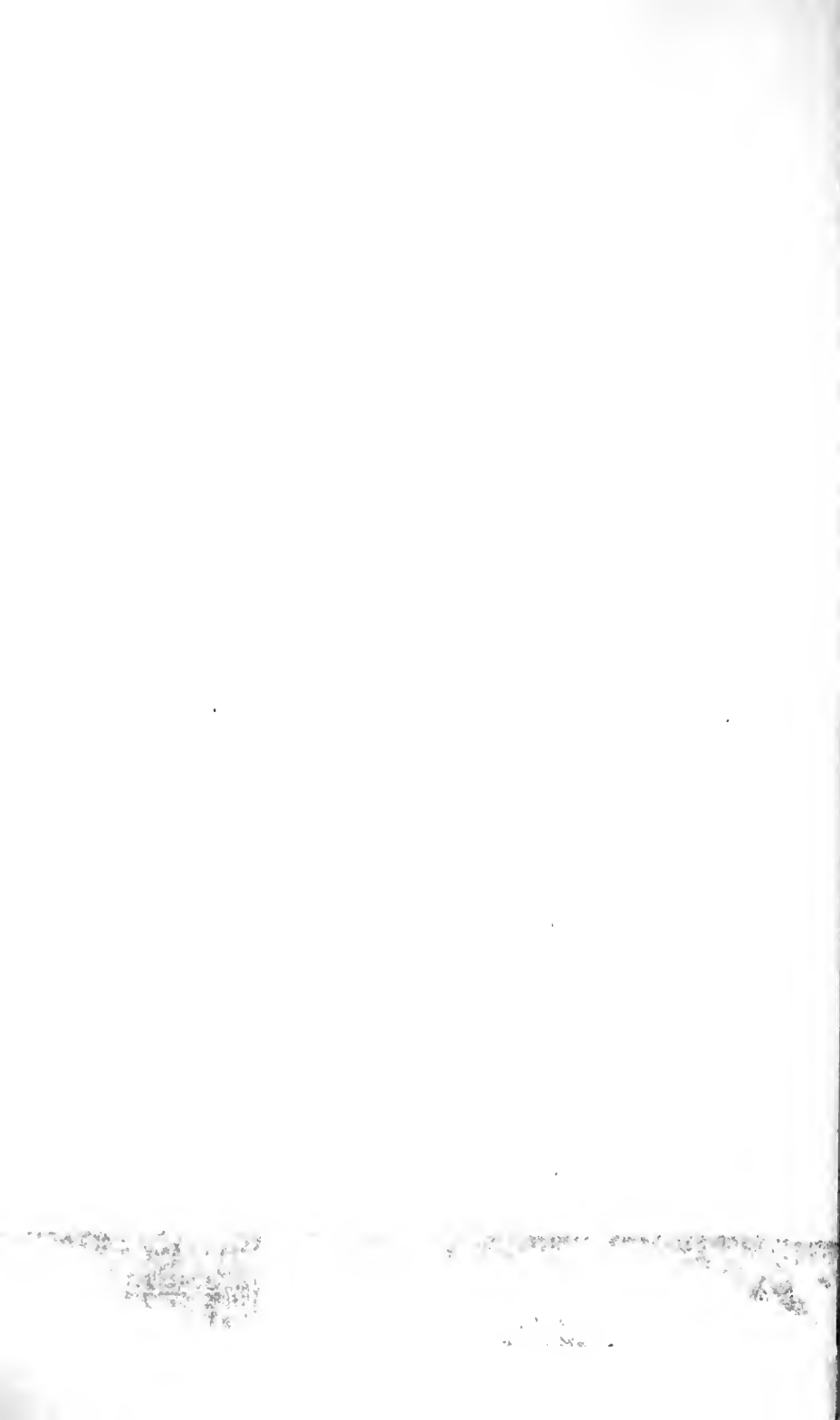


THE SCHEME -- Its conspiratorial phase.

Prior to 1949 Errion organized OYSTER PRODUCERS, INC., a Washington corporation in which was placed 500 acres of tidelands in Coos Bay, Ore. Errion was the true owner of this corporation's stock though he placed the stock in the name of nominal holders. Errion controlled the corporation which was at all times the alter ego of Errion. (T. 115, Vol. 2).

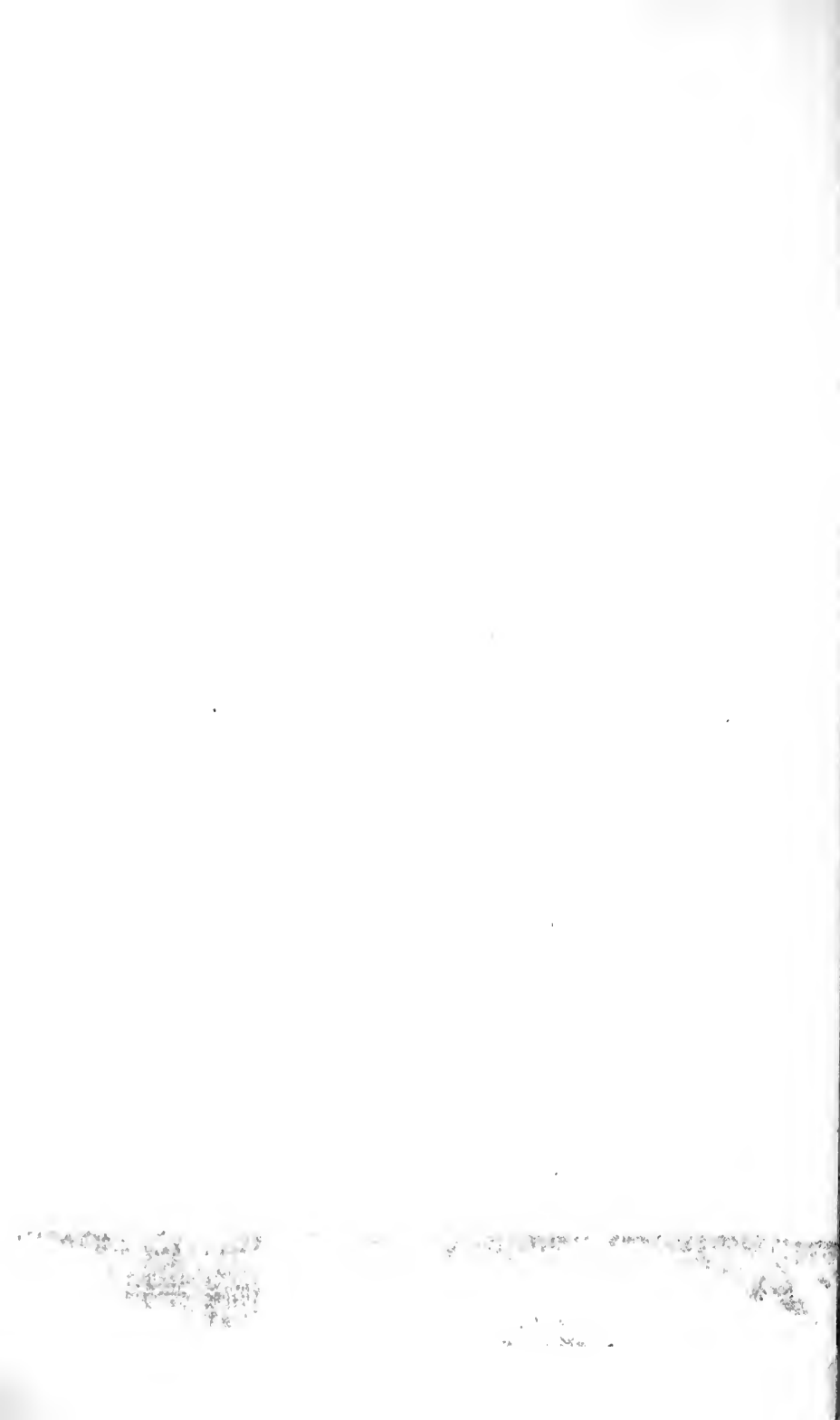
During June or July of 1949 Errion, Dwight Holdorf and Opal Holdorf, together with one Glenn Munkers (who was then holding Errion's stock in Oyster Producers, Inc.) arranged for Oyster Producers, Inc. to deed 500 acres of tidelands to Dwight and Opal Holdorf, the latter giving to the corporation a five year promissory note secured by mortgage to said tidelands in the approximate amount of \$200.00 per acre or \$400,000.00. For purpose of furnishing public evidence that the land had been bought for \$200.00 per acre Errion and Dwight Holdorf affixed Federal Documentary Stamps to the deed in amount sufficient to show the consideration as being \$400,000. No cash or other valuable consideration passed. The trial Court found the transaction not to be a bona fide sale of land for \$100.00 per acre or any other substantial amount. (T. 116, Vol. 2).

In early October of 1949, Errion, Dwight and Opal Holdorf caused to be organized the Holdorf Oyster



Corporation, a Washington corporation for the express purpose of taking title to tidelands as held by Dwight and Opal Holdorf and to enable the corporation instead of Dwight and Opal Holdorf to convey 125 acres of such tidelands to Mrs. Connell. Again, all the stock in names of Dwight and Opal Holdorf was held by them for Errion, who paid for such and had same endorsed in blank and handed over to him as soon as the corporation had been organized. (T. 676, 684, 790). Dwight and Opal Holdorf, as officers of the corporation, conducted the corporate affairs under direction of Errion with knowledge that the corporate actions were part of the scheme to defraud Mrs. Connell and that, contrary to appearance, the corporation was but the alter ego of Errion. (T. 115, Vol. 2).

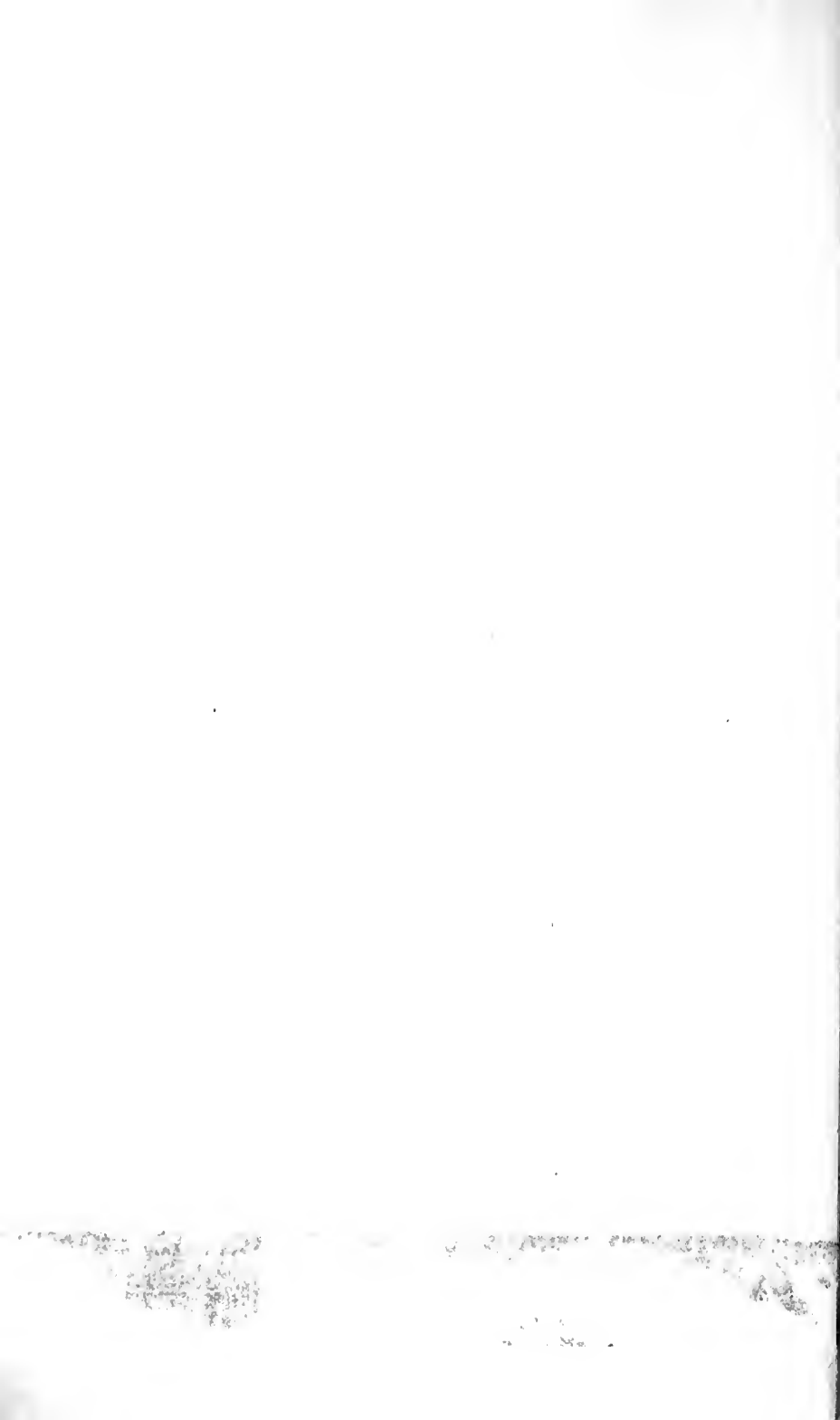
That as soon as Holdorf Oyster Corporation was organized in October of 1949, Dwight and Opal Holdorf conveyed 469½ acres of the 500 acres of their tidelands to that corporation in consideration of Holdorf Oyster Corporation assuming the note and mortgage of Oyster Producers, Inc. to the said tidelands. Again, Errion and Dwight Holdorf affixed to the deed Federal Documentary Stamps sufficient in amount to represent that the sale was for a consideration of \$800.00 per acre. No cash or other valuable consideration was given by the corporation for the tidelands and the Court found



the transaction was not a bona fide sale but an attempt to establish evidence of false value for the land as part of the scheme to defraud Mrs. Connell. (T. 117, Vol. 2; T. 791-796). From the 469 $\frac{1}{2}$ acres of tideland which Holdorf Oyster Corporation received, it deeded to Mrs. Connell 125 acres on October 19, 1949; she giving her \$124,180.09 of securities and other property to Holdorf Oyster Corporation and/or E. R. Errion in exchange. (Ex. A-5).

The 30 $\frac{1}{2}$ acres of tidelands which Dwight and Opal Holdorf reserved when conveying the rest of the 500 acres to Holdorf Oyster Corporation, they conveyed on August 24, 1949 to Graham and Edith Skene, victims of the identical type of fraud as practiced on Mrs. Connell in point of time and representations. (T. 792, 720-725).

Appellant Violet Kellerstrass, 41 year old and unmarried sister of Errion lived in an apartment in Portland adjoining the Errion apartment with a companionway connection. (T. 572). Both apartments shared the same telephone (T. 519). She was kept busy receiving telephone calls and messages and writing letters for Errion (T. 479). Violet Kellerstrass maintained a joint bank account with Errion in a Portland bank wherein all money in the account belonged to Errion. (T. 565, 585). In 1949 she opened a safe deposit box in a Vancouver, Washington bank and gave Errion power of attorney to the



box (T. 576). After Mrs. Connell's real property at 811 14th Avenue, Seattle was conveyed to the Holdorf Oyster Corporation in the principal transaction, it was later placed by Errion in the name of his sister, Violet Kellerstrass, to disguise the true ownership which Violet Kellerstrass at the time well knew. (T. 566).

In the early part of 1953, she ostensibly sold the property for \$11,400.00 and for purpose of concealing the true recipients of the purchase money forthwith reduced the \$11,400.00 to cashier checks at Seattle and in a deliberately confusing series of transactions involving the further exchange of cashier checks she deposited the \$11,400.00 in part to the joint account of herself and Errion in a Portland bank and in part to a bank account of Dwight and Opal Holdorf in a Vancouver, Wash. bank. (Study of Ex. 35, 18, 13, 14, 15, 19, 20, 21, 22, 28).

Appellant Amy Errion as wife of Errion was present with Errion in Mrs. Connell's home during some of the transaction; acted as Errion's secretary and typed documents in Mrs. Connell's home in connection with the transaction. (T. 161). She was the person who took Mrs. Connell's corporate securities to the Seattle office of Merrill, Lynch, Fenner & Beane; selling same on her own account with written consent of her husband, Errion (Ex. 65, 66), and then taking the principal proceeds of \$24,624.11 and after reducing to cashier checks



at Seattle, turned them over to Errion. Later she received a further check from the brokerage firm for said securities in amount of \$122.61 which she deposited in her own Salem, Ore. bank account (Ex. 67). Her further participation will appear in connection with the facts in respect to the "lulling" activities of the scheme.

The conspiratorial activities of Appellant C. W. Williamson is best set forth in narrating the "lulling" activities of the scheme.

THE SCHEME -- Its "lulling" phase.

The very first "lulling" activity in the scheme was on the part of Errion who persuaded Mrs. Connell not to inspect her newly acquired "Oyster" land and to stay away from Coos Bay, Ore. She was also advised not to discuss her transaction with others; particularly lawyers and to await developments. (T. 123, Vol. 2; T. 133).

Another early "lulling" activity of the scheme was to permit her to remain in her home at 2812 Mt. St. Helens Place, Seattle, rent free although the home had been conveyed to Holdorf Oyster Corporation. (T. 123, Vol. 2).

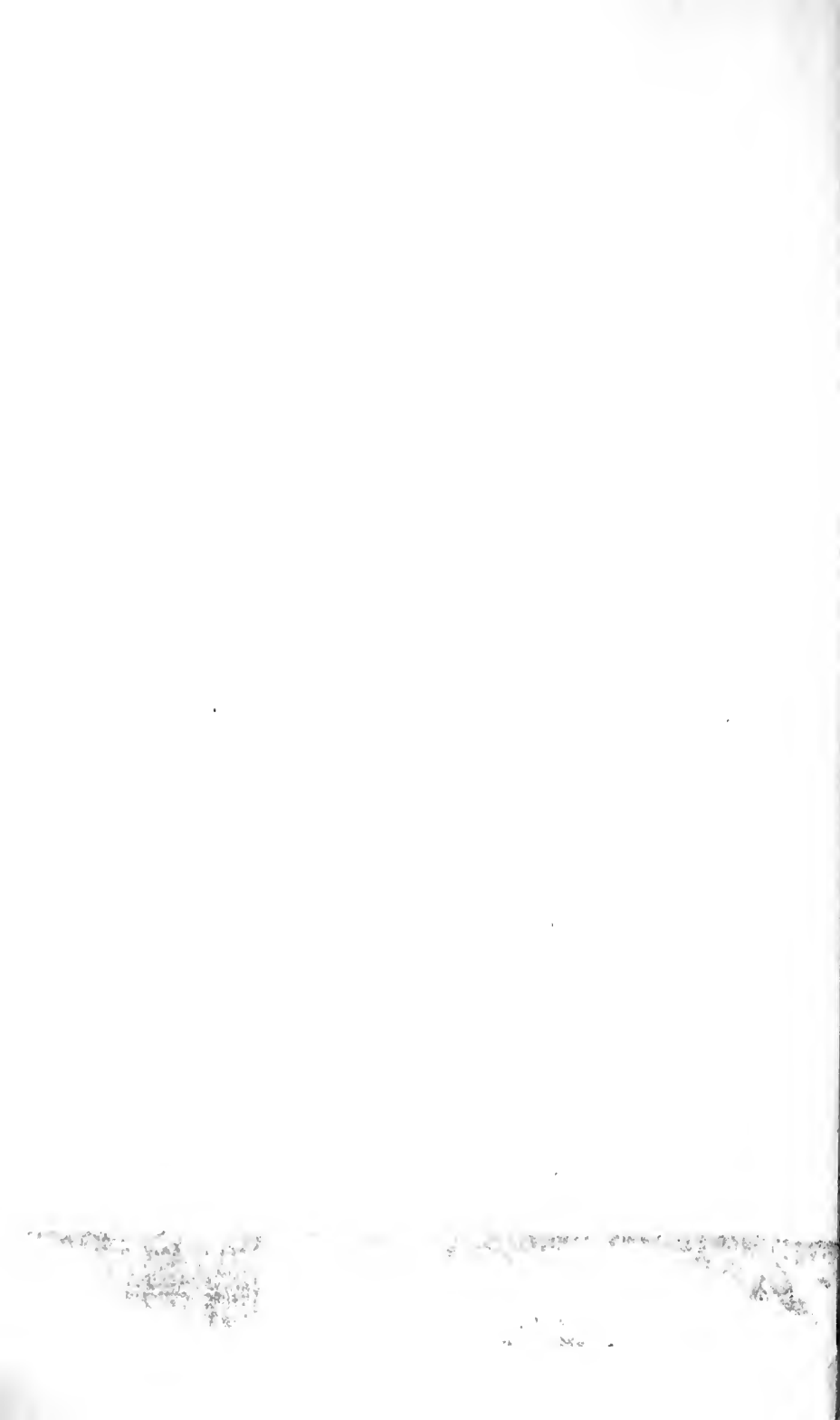
As a further "lulling" activity Errion arranged for Amy Errion and Mrs. Connell to visit and travel in



Southern California commencing in July, 1950. What was intended as a short trip extended to nearly five months and ended just before Christmas of 1950. The Court found that this trip had as its purpose the hindering of Mrs. Connell from discovering the true facts concerning her transaction. (T. 123, Vol. 2).

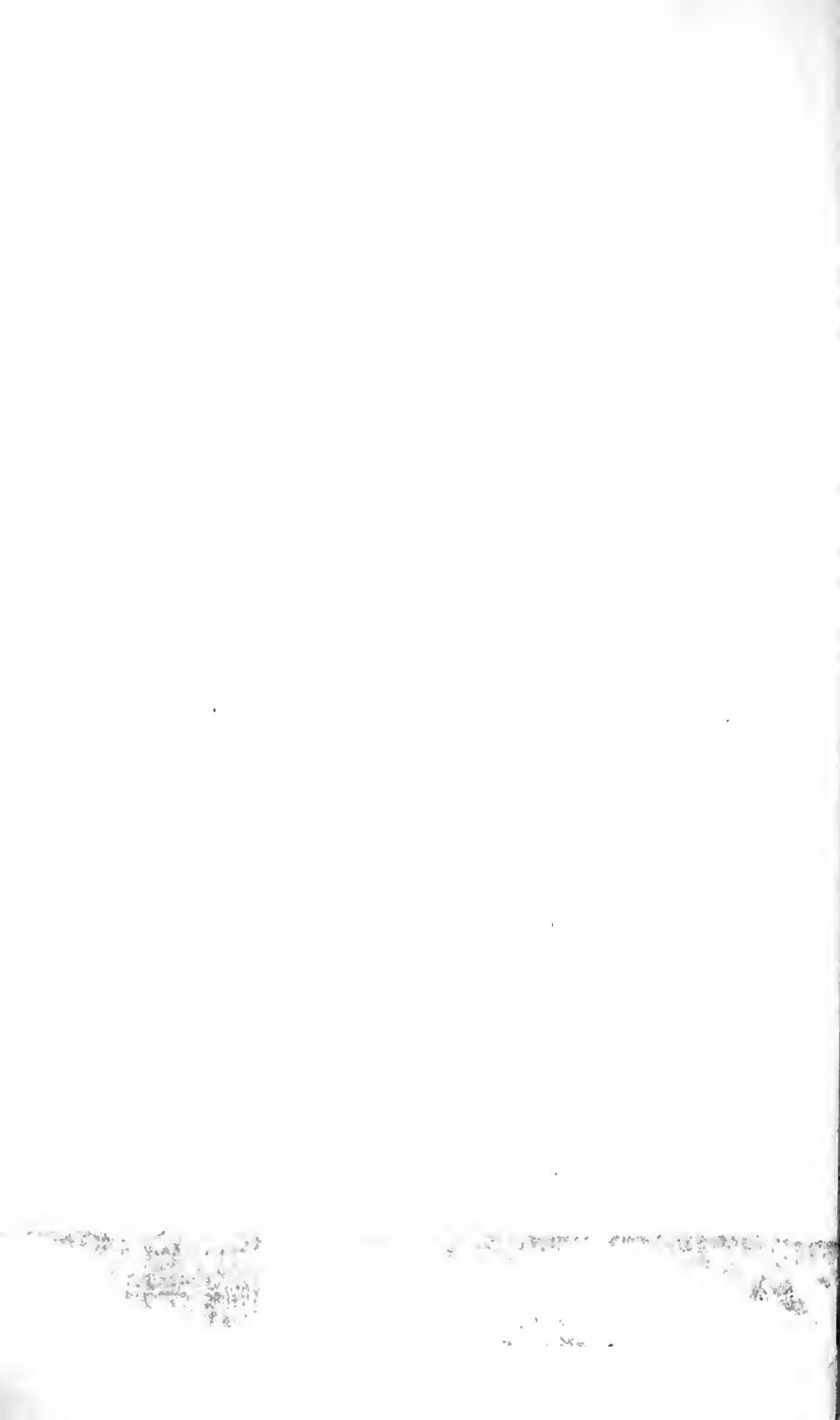
To further placate Mrs. Connell, the Holdorf Oyster Corporation advanced to her various amounts of money at various times between September, 1950 and April, 1951 in total amount of \$4,230.95, taking her promissory notes in return. (T. 124, Vol. 2) These funds came from the sale of her various contracts. (T. 837).

However, the most elaborate "lulling" activity of the scheme came in December of 1950 while Mrs. Connell and Amy Errion were still in Los Angeles. With Amy Errion first advising Mrs. Connell that Errion was arriving with "some fine news" (T. 118) and with Amy present in a Los Angeles motel, Errion arrived on December 14, 1950 and presented to Mrs. Connell an "Indenture of Lease" which had already been executed by C. W. Williamson in Oregon (T. 123, Ex. 4). Errion told Mrs. Connell that C. W. Williamson was a man of great wealth from the East who was interested in undertaking the business of cultivating oysters in Coos Bay, Ore. He represented that if Mrs. Connell signed the



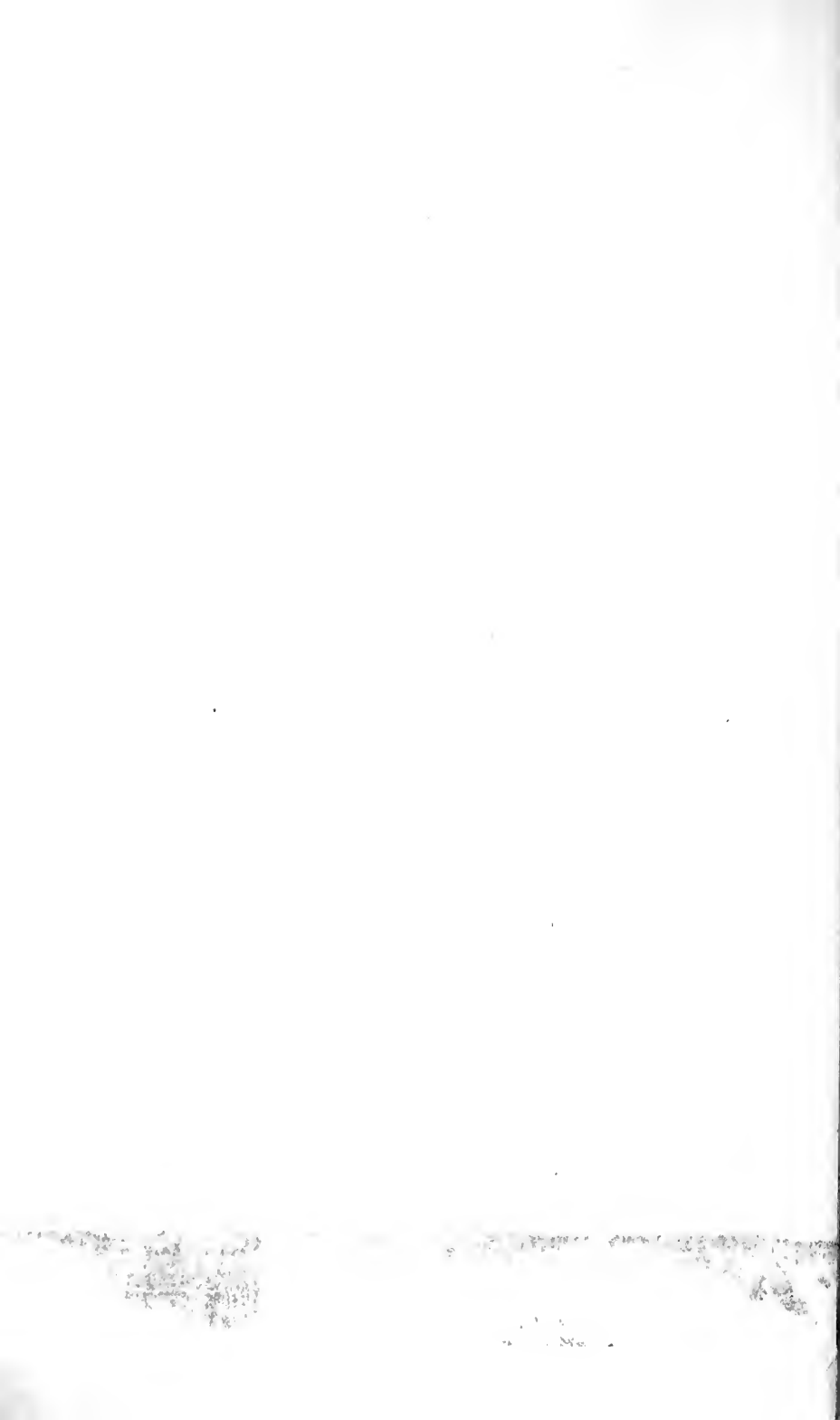
"Indenture of Lease" and thus leased her land to C. W. Williamson with an option to purchase, C. W. Williamson would not only cultivate the "Oyster" land and pay her one-third of the profits but that he would also over a twelve year period purchase her 125 acres for \$1,200.00 per acre or a total of \$150,000.00. At the same time he advised Mrs. Connell for the first time that the Port of Coos Bay had withdrawn its condemnation action against her 125 acres of tideland but added that in the meantime the Port of Coos Bay in dredging the channel had damaged the land and that she had a good cause of action for damages against the Port of Coos Bay which he would prosecute for her and see that she collected a large sum as damages. When Mrs. Connell told Errion she wanted her money while she was alive and not after she was dead, Errion was quick to advise that the "Indenture of Lease" if executed was a security upon which she could take to any bank and borrow a large sum of money (T. 125). Relying on the representations of Errion, Mrs. Connell did not read the "Indenture of Lease" as carefully as she might otherwise have done and she executed it believing it to be as represented by Errion. (T. 124-127, Vol. 2).

The "Indenture of Lease" (Ex. 4), while appearing to be a document as represented by Errion was in truth a document that obligated C. W. Williamson to



purchase over a period of time only \$30,000.00 worth of tideland at \$1,200.00 per acre. It was also worthless as a security on which to borrow money. In truth, C. W. Williamson was not a man of wealth; came from Salem, Oregon; had no money to purchase such land; had no intention of cultivating the "Oyster" land; had never seen the land and knowingly permitted himself to be used as a "front" for Errion and Dwight Holdorf to further "lull" Mrs. Connell by paying to her thereafter in accordance with the "Indenture of Lease" in a series of semi-annual payments a total of \$22,500.00. (T. 126, 133, Vol. 2). This money was passed to C. W. Williamson during 1951, 1952 and the first half of 1953 by Dwight Holdorf, Holdorf Oyster Corporation and National Forest Products, another Washington corporation which was found to be but the alter ego of E. R. Errion. (T. 127, Vol. 2). Each time the money was deposited to the account of C. W. Williamson, part was retained by him and the rest forthwith sent to Mrs. Connell. He personally kept at least \$1,700.00 (T. 133, Vol. 2). In June of 1953 C. W. Williamson defaulted in making payments to Mrs. Connell under the "Indenture of Lease" agreement.

Another contemporaneously conducted "lulling" activity in the scheme transpired in July of 1951 when Errion deeded back to Mrs. Connell her home; taking a \$16,000.00 note and mortgage which he thereafter



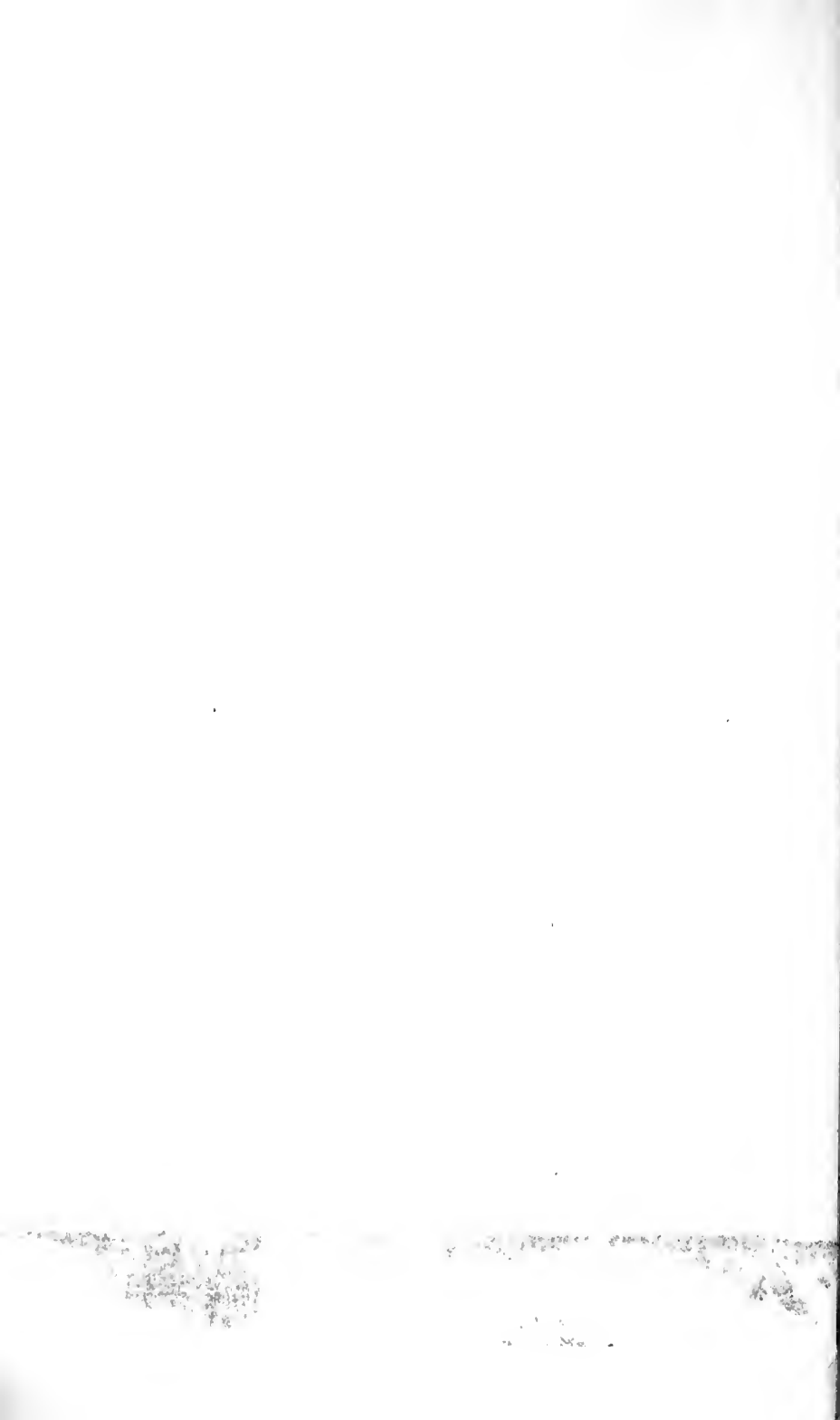
hypothecated to Glaser for \$16,000.00 cash. Details are set forth in Finding No. 24 (T. 127, Vol. 2).

THE SCHEME -- Use of Instrumentalities of Interstate Commerce.

In the scheme to defraud Mrs. Connell, Appellants used both directly and indirectly the United States mails (Ex. 33, 54, 79), instrumentalities of interstate commerce (T. 960, 122, 174, Ex. 15, 67) and the facilities of a national securities exchange (T. 960) in violation of Sec. 10(b) of the Securities and Exchange Act and Rule X-10B-5 of the Commission. (T. 134, Vol. 2)

A substantial amount and number of securities were involved in the single indivisible transaction.

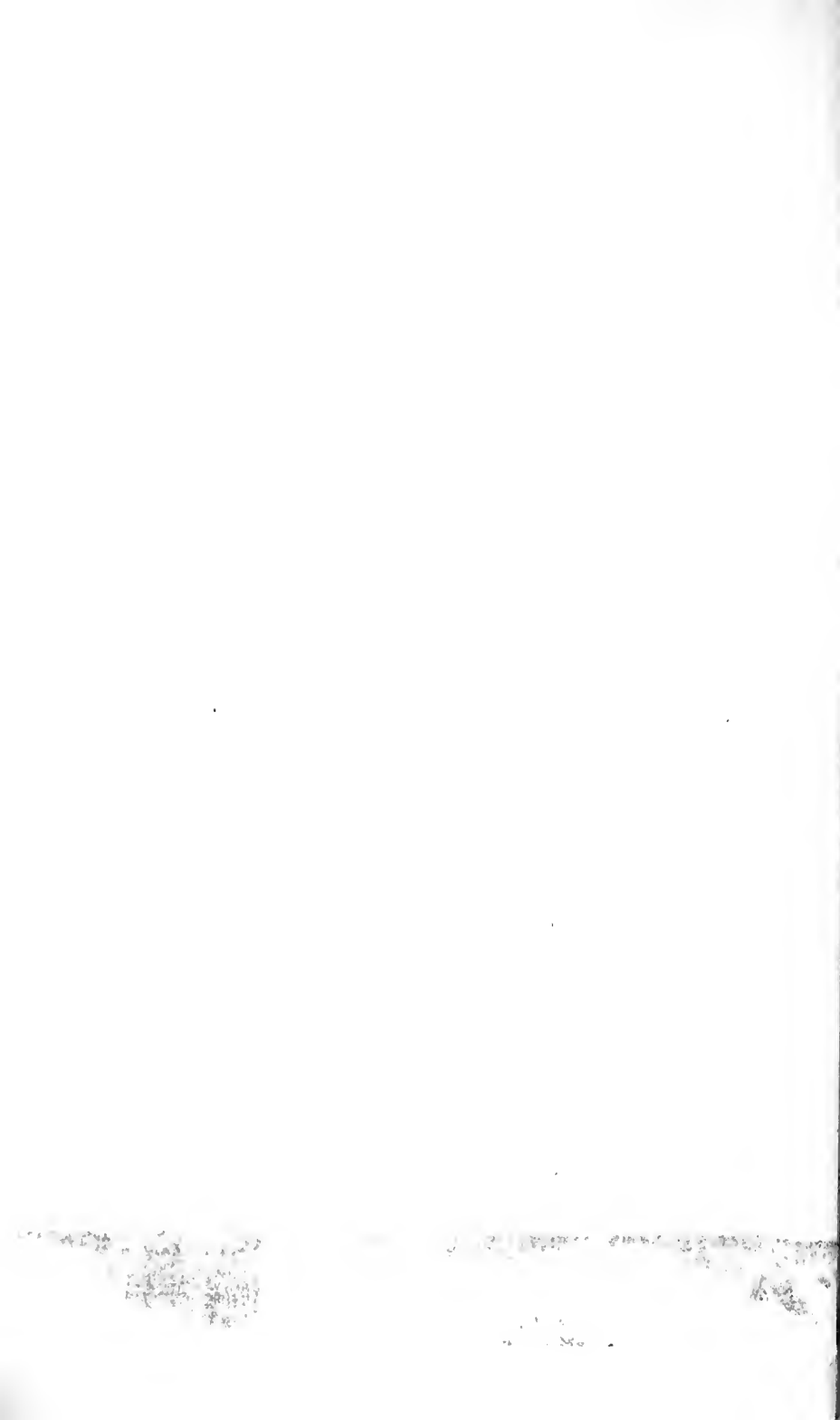
Of the \$124,180.09 worth of securities and non-securities fraudulently taken from Mrs. Connell, there were included \$24,624.11 worth of corporate shares of seven different firms. These were unquestioned securities. The "Kalland" promissory note held by Mrs. Connell with maturity exceeding nine months and having a value of \$915.80 was also without question another security. (15 U.S.C. Sec. 78c(10)). Such unquestioned securities represented a substantial and important part of the transaction and should be sufficient to satisfy the Court that the transaction in substance involved securities every bit as much as non-securities.



Only if there is a question about this view do we raise the Federal question and contend that the annuity taken from Mrs. Connell of another \$25,000.00 in value and the three conditional sales contracts - "Bogardas", "Rankin" and "Johnson" - aggregating in value \$11,623.79 were also securities.

Sec. 3(10) of the Securities and Exchange Act of 1934 (15 U.S.C. Sec. 78c(10)) in defining "securities" includes any instrument "commonly known as a security". The Court should also appreciate that although the Securities Act of 1933 (15 U.S.C. 77c(8)) exempts "annuity contracts" from its operation the 1934 Securities and Exchange Act does not.

A "security" has been defined as a written assurance for return or payment of money; evidence of indebtedness. Penn Co. for Insurance on Lives and Granting Annuities v. United States, (D. Ct., Pa., 1941) 39 F. Supp. 1019, 1021. The term "security" under present usage has a generous scope far beyond its literal meaning. Trenton Cotton Oil Co. v. C.I.R. (6 Cir., 1945) 147 F.2d. 33, 37. The Court is required to look at substance; not form and to adopt a broad concept of the term "security". S.E.C. v. Universal Service Ass'n (7 Cir., 1939) 106 F.2d. 232, 237. S.E.C. v. Bailey (D. Ct., Fla., 1941) 41 F. Supp. 647, 650. It was observed by the court in In Re Astor's Estate (1946) 62

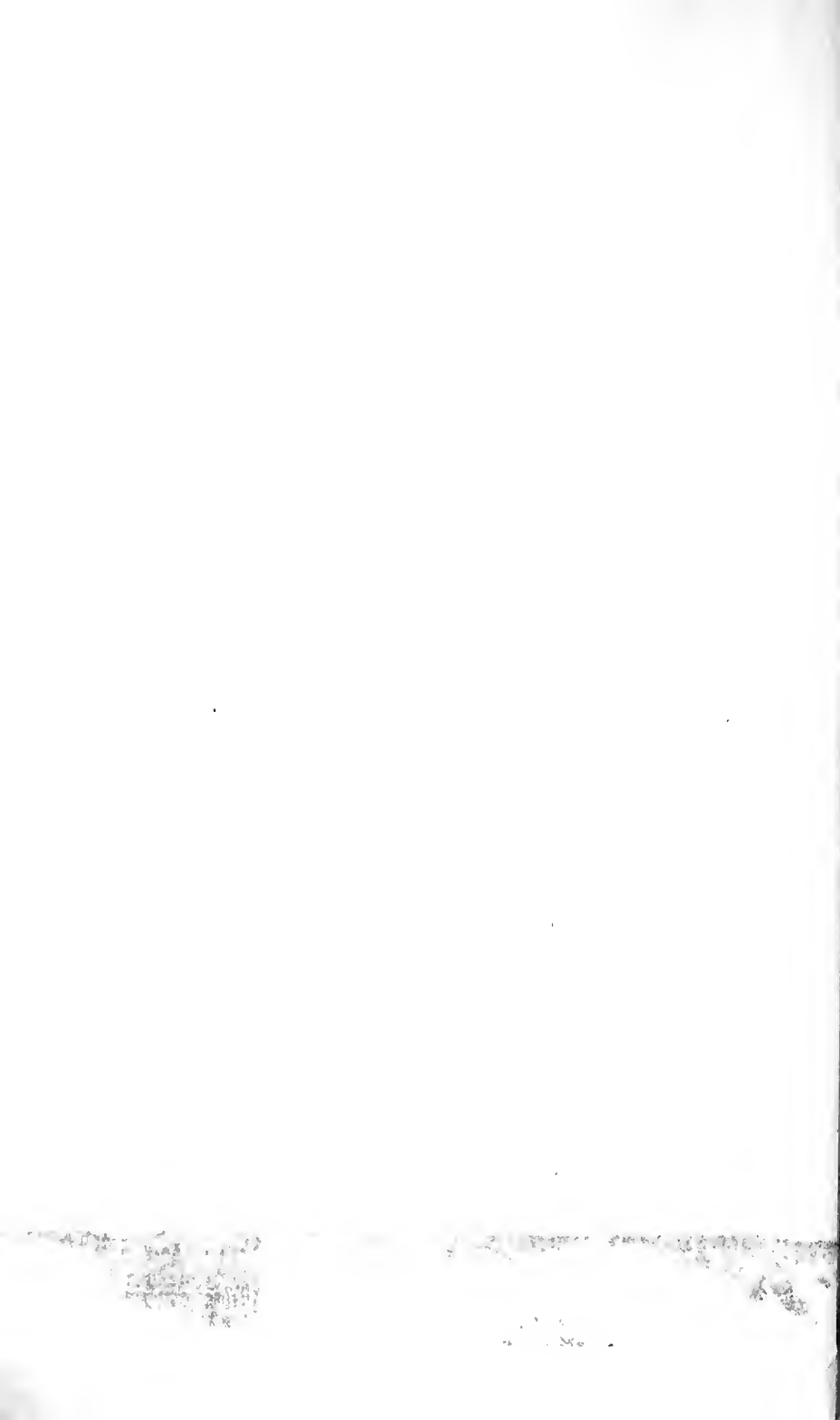


in exchange for the corporate shares and second, 125 acres of "Oyster" land for return of Errion's note and other property, the jurisdiction of the District Court could not be defeated. Errion's note (Ex. A-3) having a maturity in excess of nine months in the second transaction was as much a security as the corporate shares were in the first. 15 U.S.C. Sec. 77c(8).

The District Court had jurisdiction over the cause and parties by reason of Sec. 10(b) of the Securities and Exchange Act of 1934 and Rule X-10B-5 of the Commission.

In spite of the fact that Appellants have not seriously attacked the trial Court's jurisdiction, either here or in the Court below, Appellee feels it her duty to clearly and succinctly show this Court that the District Court had jurisdiction of the cause and parties.

In preliminary, we should point out that Sec. 27 of the Act (15 U.S.C. Sec. 78aa) expressly grants to the District Court "exclusive" jurisdiction over civil causes arising under the Act, together with statutory authority to serve process beyond its territorial boundaries but within the United States. Coburn v. Warner (D. Ct., S.D.N.Y., 1953) 110 F.Supp. 850. However, the "exclusive" jurisdiction granted to the District Court is expressly made as an additional remedy to any other that Mrs. Connell might otherwise have had at law or in equity.

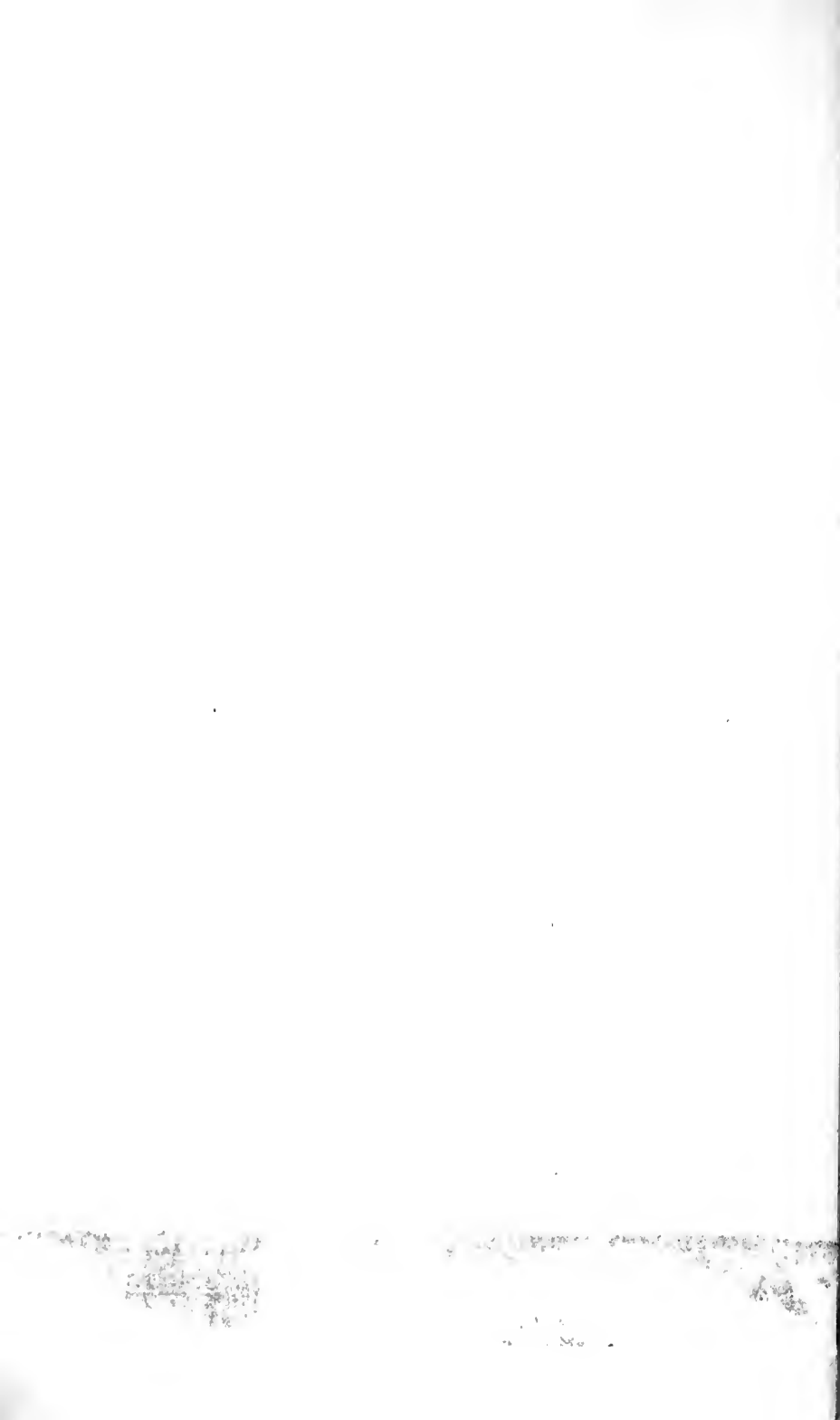


Sec. 29, (15 U.S.C. #78bb). In other words, the Act, in giving the District Court "exclusive" jurisdiction did not pre-empt the field as to causes for fraudulent purchase of securities but merely declared that Mrs. Connell could by choice or necessity forego a common law or equitable remedy and come into the District Court (but no where else) to secure relief for fraud in the purchase of her securities in violation of the Act.

Mrs. Connell in the case at bar came into the Court below and proved that Appellants had conspired in the perpetration of a scheme and device to fraudulently induce her to sell to Appellants in a single indivisible transaction \$124,180.09 worth of securities and other property for almost worthless tidelands in Coos Bay, Ore. She alleged and proved misrepresentations, fraudulent promises and omissions of fact that not only established common law fraud but as well a direct violation of Sec. 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. Sec. 78j) which reads:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange...

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public



"interest or for the protection of investors. June 6, 1934, c. 404, Sec. 10, 48 Stat. 891."

and the implementing Rule X-10B-5 of the Securities and Exchange Commission (17 C.F.R. Sec. 240, 10b-5) which reads:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails, or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

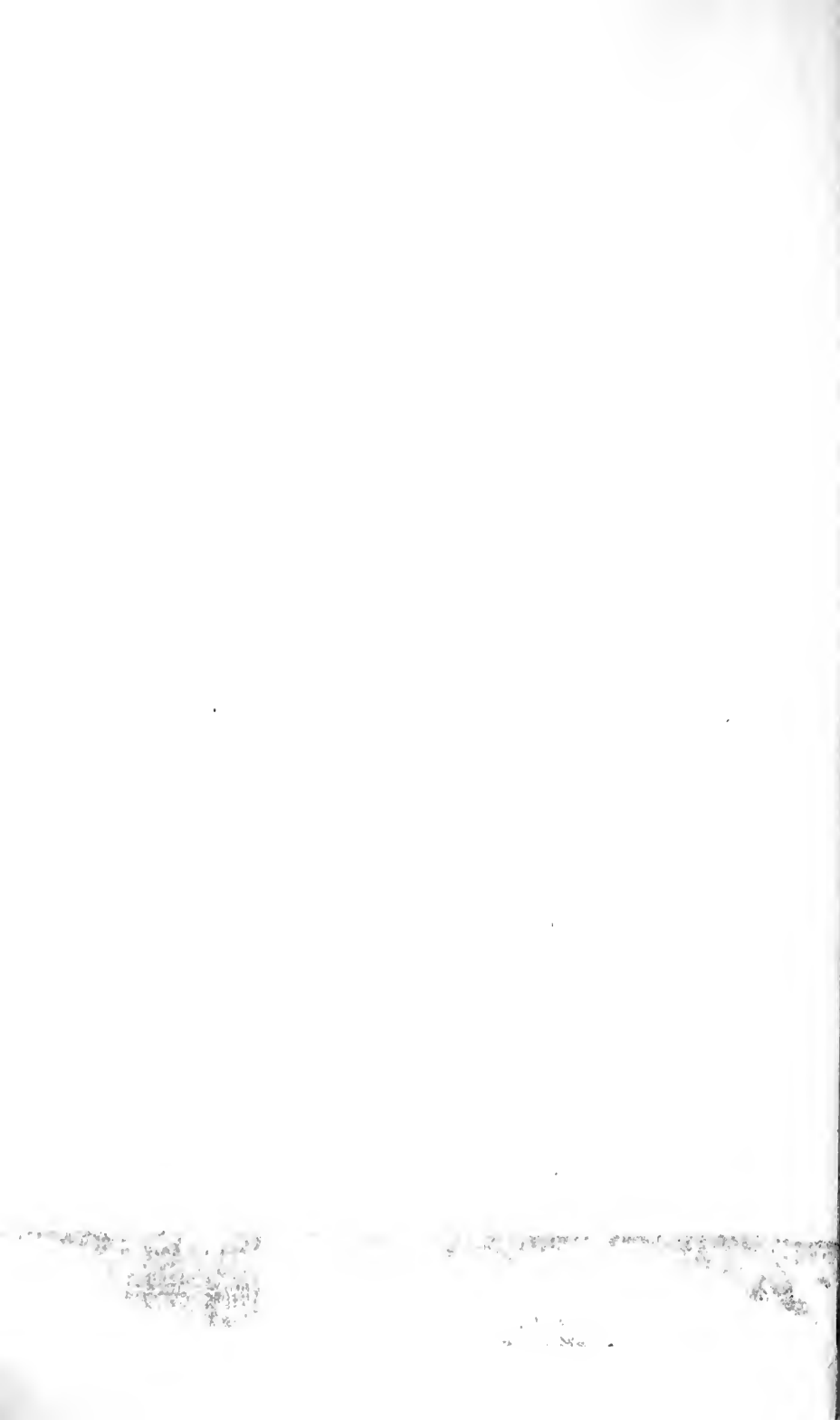
So far as Appellants' fraudulent scheme involves the purchase or sale of securities this Court and those of other Circuits have well established that persons such as Mrs. Connell have a cause of action for fraud. Her cause arises by implication from Sec. 10(b) of the Act and Rule X-10B-5 as above set forth.

Pratt v. Robinson (9 Cir., 1953) 203 F.2d. 627

Slavin v. Germantown Fire Ins. Co. (3 Cir., 1949) 174 F.2d. 799

Fischman v. Raytheon Mfg. Co. (2 Cir., 1951) 188 F.2d. 783

Kardon v. National Gypsum Co. (E.D. Pa., 1946) 69 F. Supp. 512



Speed v. Transamerica Corp. (D. Ct., Del., 1947)
71 F. Supp. 457

Robinson v. Difford (E. D. Pa., 1950) 92 F. Supp.
145, 149

Thiele v. Shields (Mar. 31, 1955, D. Ct. S.D.N.Y.)
131 F. Supp. 417, 419

Mills v. Sariem Corp.(D. Ct., June 29, 1955)
133 F. Supp. 753

"The Prospects of Rule X-10B-5: An Emerging
Remedy for Defrauded Investors", 59 Yale
L. J. 1120, 1133

"Implied Liability Under the Securities Exchange
Act", 61 Harv. L. R. 858.

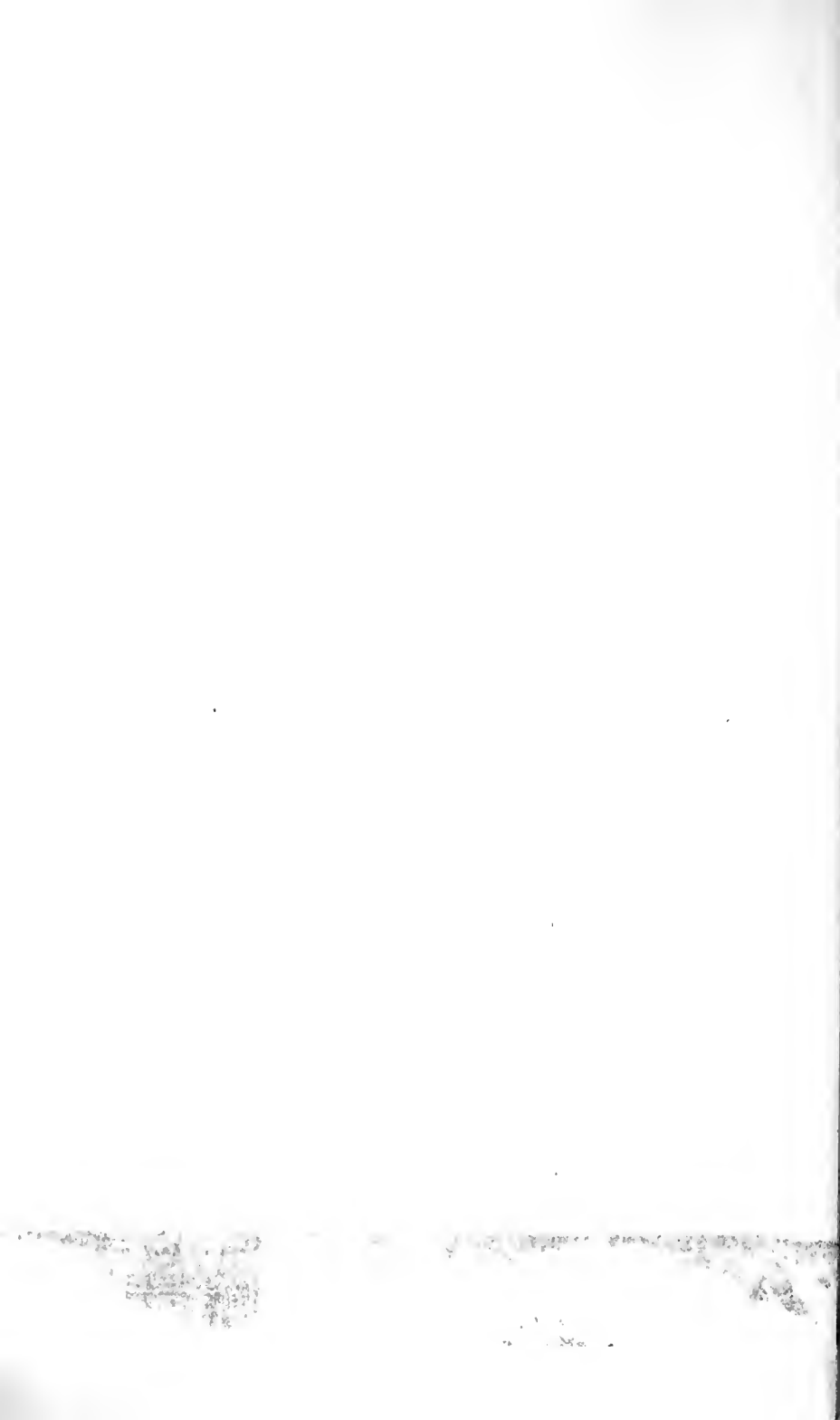
As to that portion of the judgment declaring void
and cancelling a series of notes and other instruments
involved in the fraudulent scheme, jurisdiction of the
District Court rests upon Sec. 29(b) of the Act (15 U.S.C.
Sec. 78cc(b)).

Kardon v. National Gypsum Co. (E.D. Pa., 1946)
69 F. Supp. 512

Geismar v. Bond & Goodwin, Inc. (D. Ct., N.Y.,
1941) 40 F. Supp. 876

Northern Trust Co. v. Essanau Theatre Corp.,
(D. Ct., Ill, 1952) 103 F. Supp. 954

The only possible distinction so far as juris-
diction is concerned between the case at bar and Fratt
v. Robinson, (9 Cir., 1953) 203 F.2d. 627 is that in the
case at bar Appellants, in purchasing Mrs. Connell's
securities also in the same single scheme and trans-
action acquired non-securities. Here it must be kept

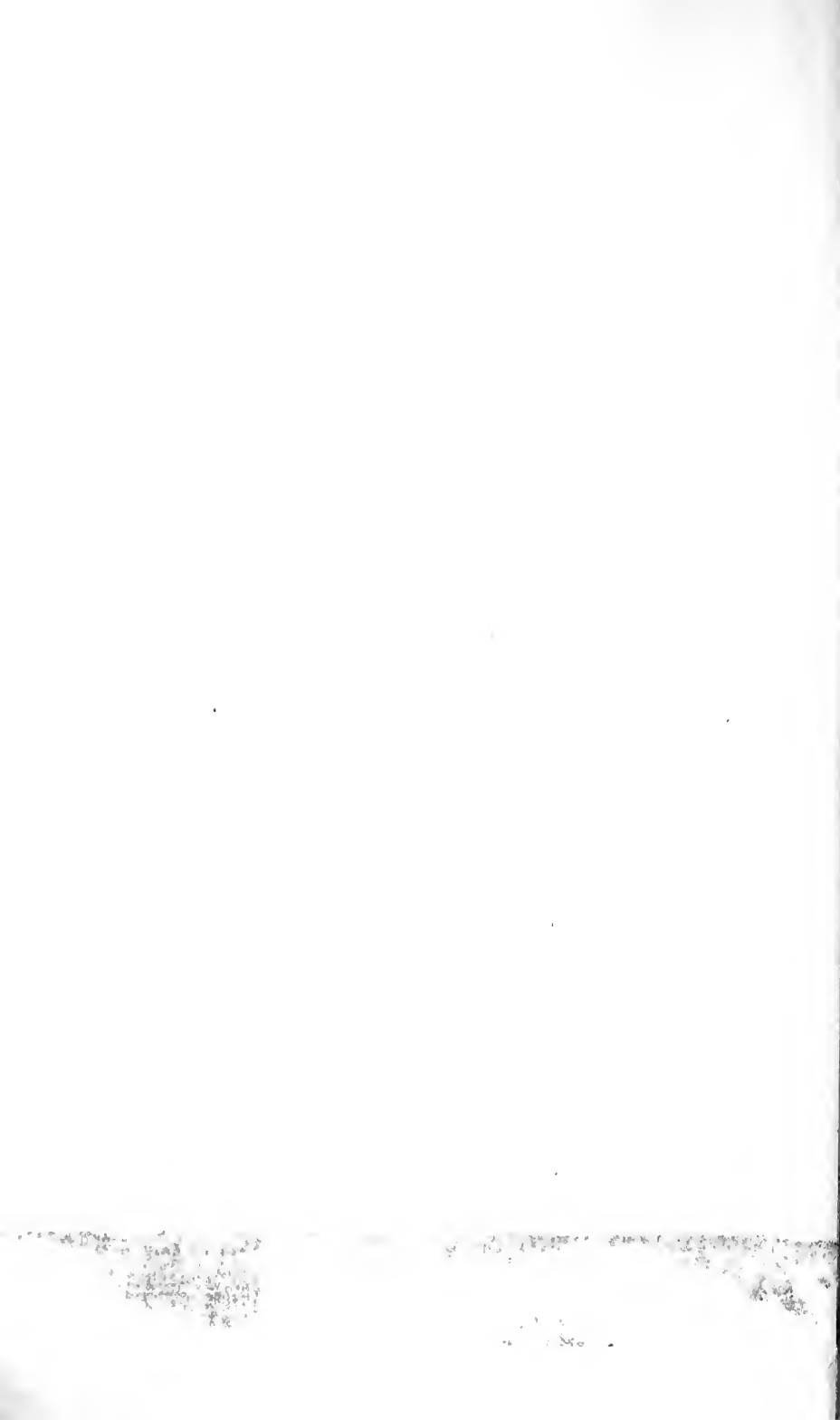


in mind that although the resultant property taken from Mrs. Connell is perhaps different and several, such does not make several the acts constituting the single wrong.

For example, where smelter fumes damaged valuable timber located upon two non-contiguous parcels of land belonging to the same owner, a single tort was involved and likewise a single cause of action. Doak v. Mammoth Copper Mining Co. (Cir. Ct., Calif., 1911) 192 Fed. 748. Or where a plaintiff lost money gambling on 47 different occasions in a "bucket shop" the Court permitted the pleading of a single scheme and not 47 different causes of action. Boyce v. Odell Commission Co. (Cir. Ct., Ind. 1901) 107 Fed. 58. Likewise, where a wrongful attachment was made upon various and separately located pieces of property the Court ruled that no matter how numerous the items of damage if they all flowed from one wrong they were the subject of but one cause of action.

Breard v. Lee (Cir. Ct., Calif., 1911) 192 Fed. 72.

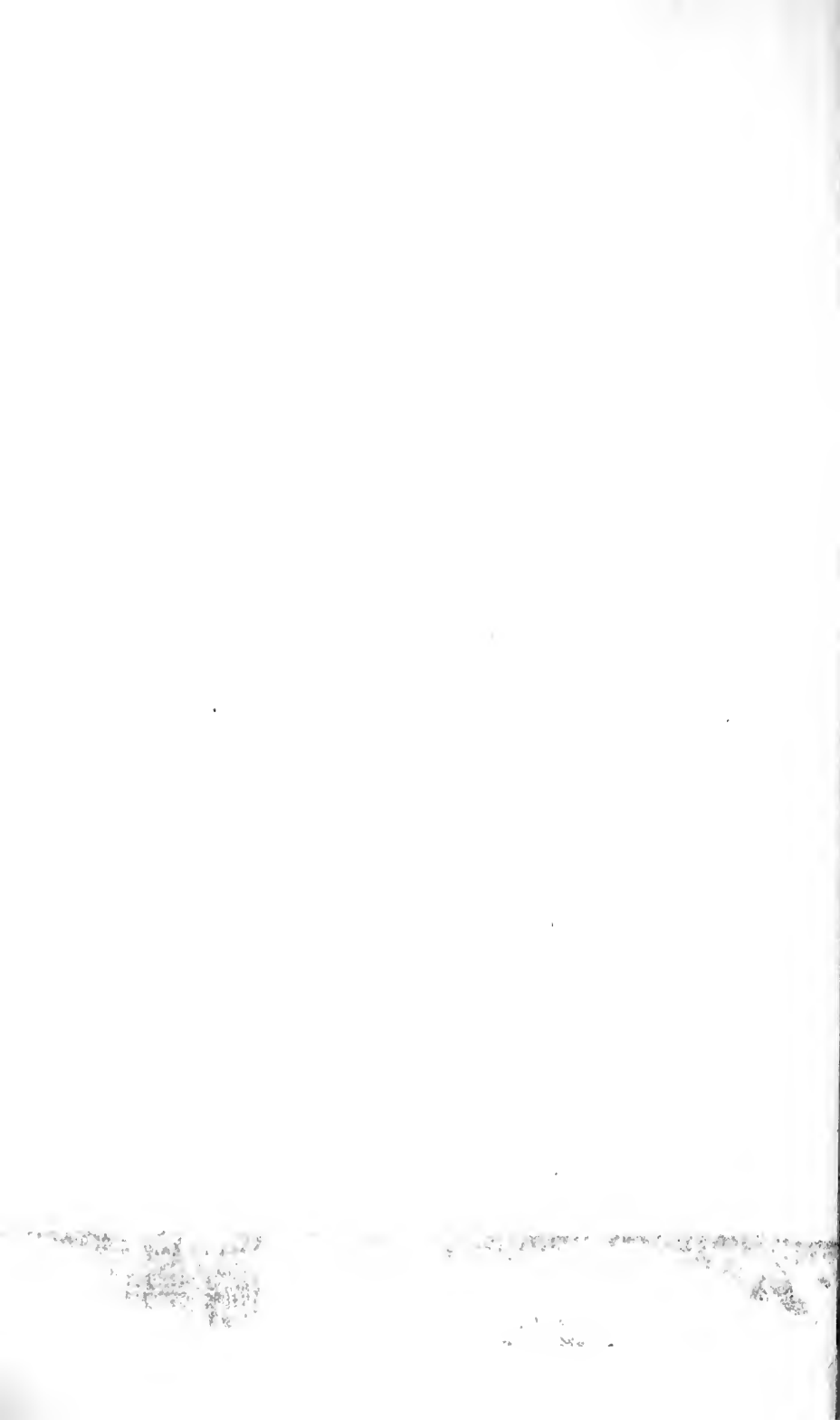
We do not believe the fact that the Appellants fraudulently induced Mrs. Connell to sell both securities and non-securities in a single indivisible transaction effects jurisdiction; particularly where the involved securities were substantial in value and number. Certainly, Appellants are of the same opinion as they have not raised this point in their brief. We believe, however, it is worthy of discussion.



In the case at bar the primary relief sought is damages for the single wrong of Appellants in fraudulently inducing Mrs. Connell through a scheme to sell \$124,180.09 worth of securities and non-securities. The single tort was a fraud which violated both the common law as well as the Act and Rule making unlawful fraud so far as the securities are concerned. The single tort cannot be dissected. In this single transaction the entire scheme; its fraudulent inducements and purposes as well as its "lulling" activities were directed as much to acquiring the securities as to the non-securities. The "lulling" activities which in part involved the return to Mrs. Connell of \$26,730.95 pertained as much to the securities as to the non-securities.

We believe that Congress in enacting Sec. 10(b) of the Act and the Commission in promulgating Rule X-10B-5 had in mind and intended to outlaw fraud in respect to all sales or exchanges of securities. While the Act and Rule were directed broadly to securities and nothing else, it did not contemplate that those who dealt fraudulently in securities could evade the broad language and purpose of the Act and Rule through the simple expedient of comingling securities and non-securities in a single indivisible transaction.

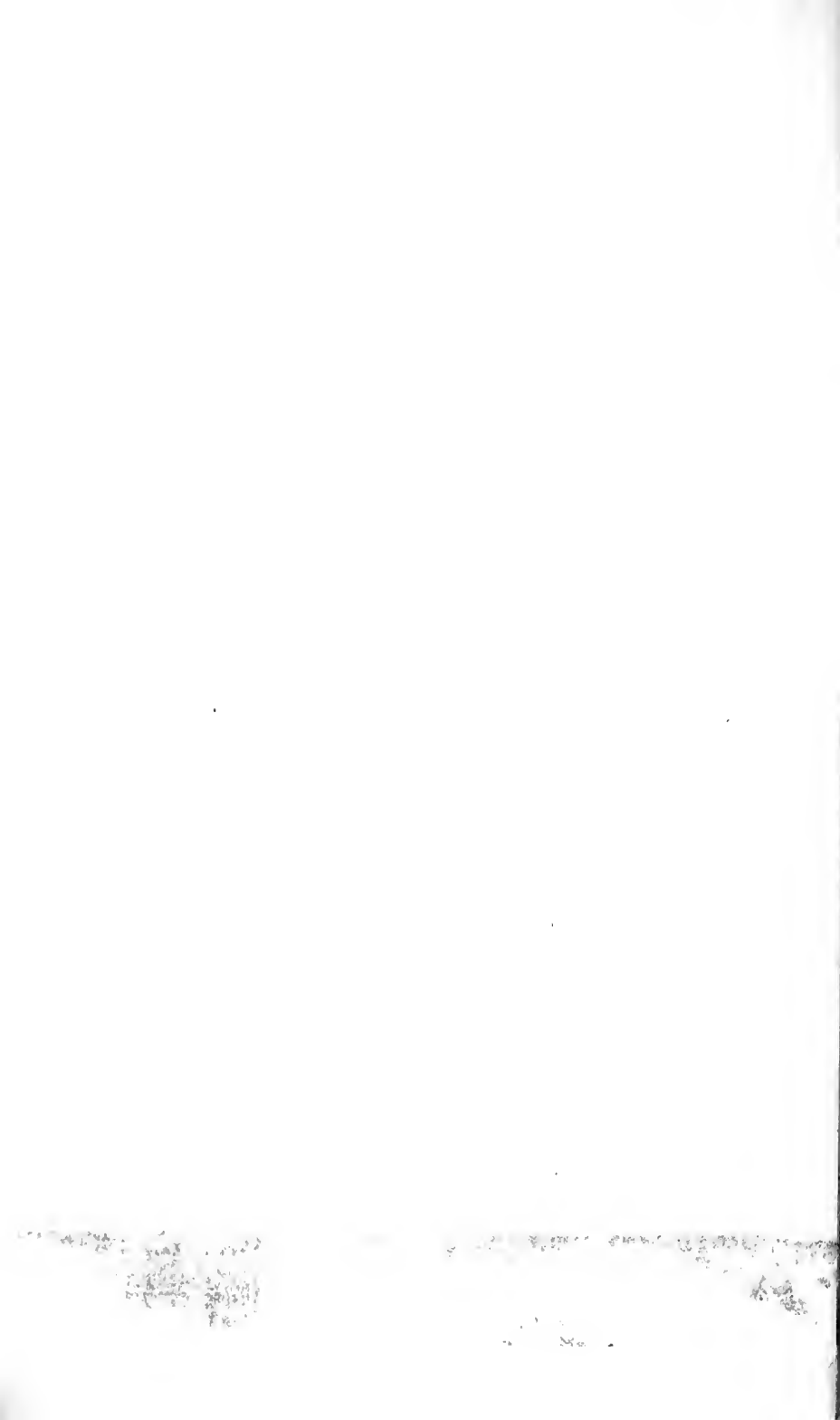
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adequate relief in respect to the securities without regard to the non-securities. This would become crystal clear if complete rescission had been granted under

Sec. 29(b) of the Act, as Mrs. Connell pleaded in one cause and could have elected had the Appellants not dissipated the "loot". The District Court with its unquestioned jurisdiction over securities would have been unable to grant rescission of the sale of the securities and not the non-securities. It is axiomatic that rescission of a transaction cannot be "piece-meal" -- its either the entire transaction or nothing. O'Keefe v.

Hill (3 Cir., 1939) 105 F. 2d. 325; Weiskircher v. Volk (1905) 29 Pa. Super. 611; Williston on Contracts (Rev. Ed. 1937) Vol. 5, Sec. 1525; Black on Rescission and Cancellation (2nd. ed.) (1929) Vol. 3, Sec. 583, 584.

At the invitation of the trial Court the Securities and Exchange Commission appeared by brief amicus curiae sur motions to dismiss. The Commission supported the position of Mrs. Connell on the jurisdictional question. On page 11 of its brief the Commission said:

"The fact that by this purchase defendants also acquired non-securities does not render Rule X-10B-5 inapplicable. So far as we know, this is the first action under Rule X-10B-5 which has involved such a combination purchase; and so there is no prior court ruling. The statute and rule, however, are literally applicable; and it is obvious that a contrary holding would afford a rather simple method for frustrating the purpose of the legislation. Were a fraudulent buyer of securities able to avoid

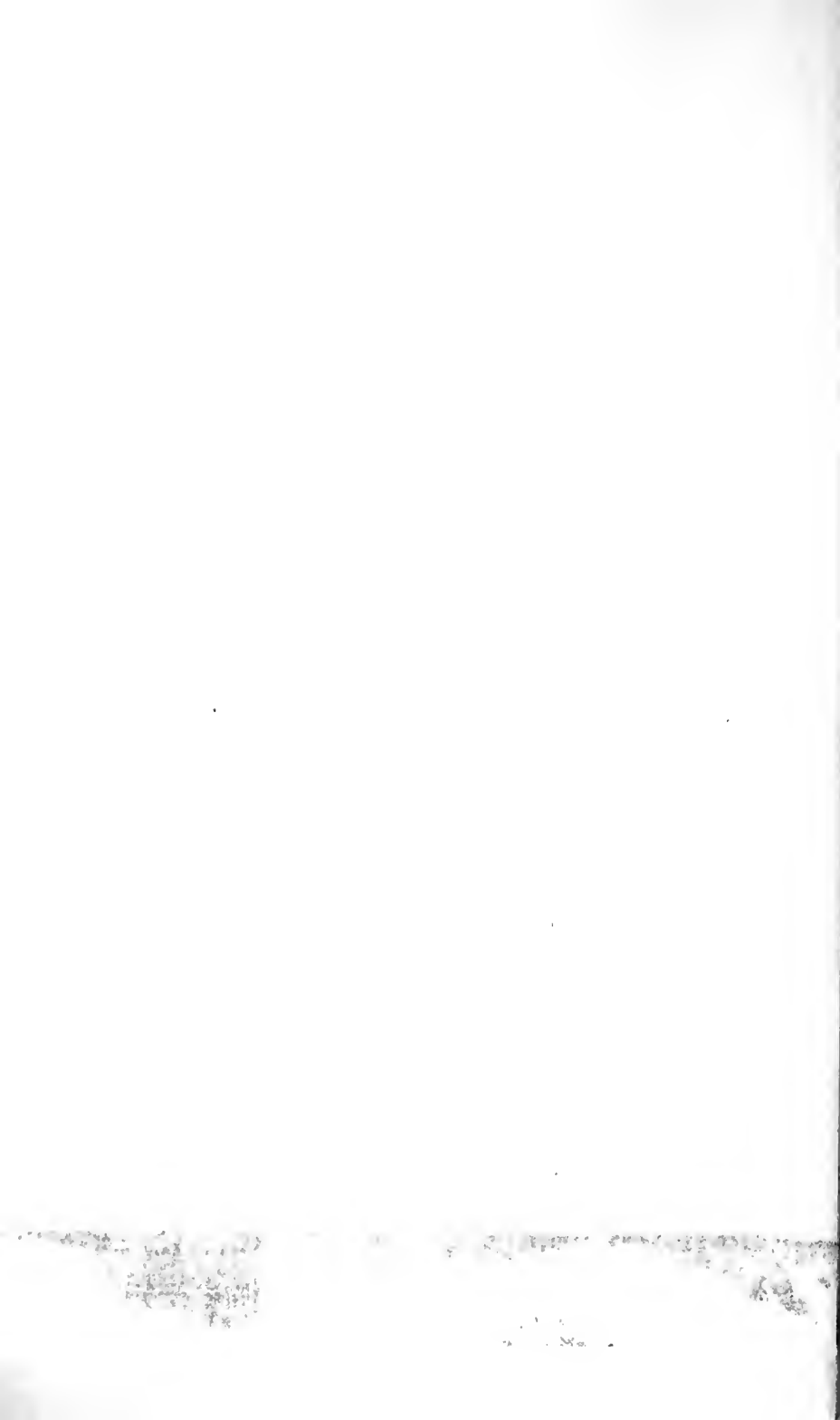


"liability under Rule X-10B-5 merely by purchasing a non-security from the seller at the same time, it is evident that the rule could easily be rendered meaningless. The Court, we feel, should have no difficulty in determining that the instant complaint does allege a violation of Section 10(b) and Rule X-10B-5 thereunder. Section 27 gives the Court exclusive jurisdiction to determine the recovery to which plaintiff may be entitled under the statute."

On the other hand, Appellants at page 20 of their brief rely upon Joseph v. Farnsworth Radio & Television Corp. (D. Ct., S.D.N.Y., 1951) 99 F. Supp. 701; affirmed in 198 F.2d. 883, in urging this Court to give a narrow construction to Sec. 10(b) of the Act, contrary to its prior holding in Pratt v. Robinson, supra. The point in that decision which prompted Judge Sugarman to express himself as quoted in Appellants brief was the lack of privity between seller and purchaser; a situation which does not exist in the case at bar. Nor, as Appellants contend, is the scope of Sec. 10(b) of the Act limited to "insiders". Birnbaum v. Newport Steel Corp. (2 Cir., 1952) 193 F.2d. 461, cert. denied in 343 U.S. 956, 96 L.Ed. 1356.

The "pendent" jurisdiction of the Federal Court is adequate to give it power to determine Appellee's cause respecting the non-securities which are comingled with the securities in this single cause for the single fraud.

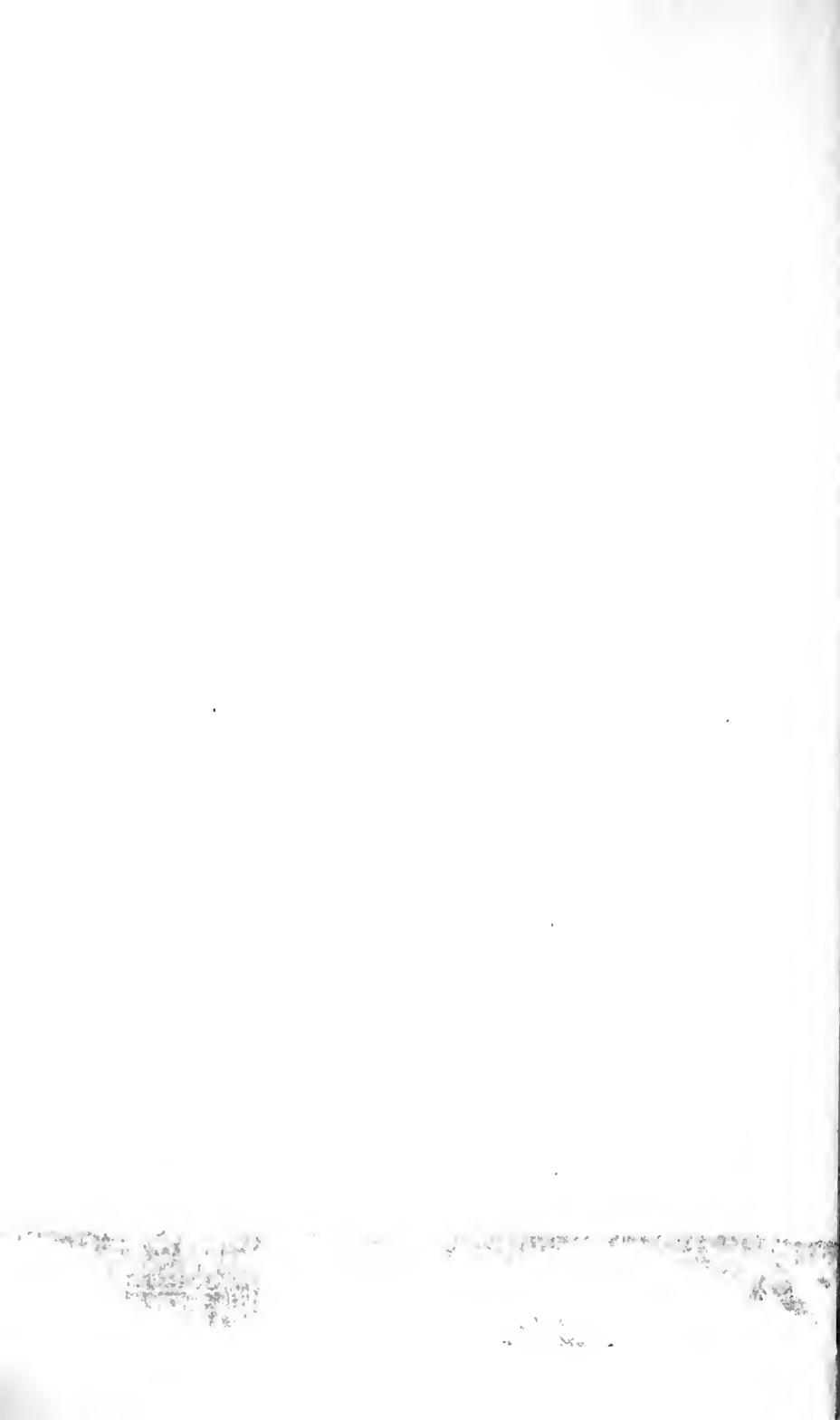
It has long been settled that the Federal Court when presented with a federal question that forms the



ingredient of an original cause has jurisdiction of the complete case and may exercise its "pendent" jurisdiction to determine other non-federal questions of fact or law which are inextricably involved. Osborne v. President of the Bank of United States (1824) 9 Wheat 738, 822,

6 L.d. 204.

The case at bar, seeking damages arising out of the single fraudulent scheme and involving the Federal subject of securities as well as the non-federal subject of non-securities is precisely similar to the common situation of a plaintiff coming into a Federal Court and seeking damages in a single action for copyright infringement and unfair competition, both arising out of the same set of facts. There, the Federal copyright law is violated by the same acts which violate the common law concerning unfair competition. There, the Federal Court takes, as of right, the cause as to the copyright infringement and in exercise of its "pendent" jurisdiction determines simultaneously the non-federal facts and law involving the unfair competition. Just as "pendent" jurisdiction gives the Federal Court jurisdiction over unfair competition, so should it give the Court below jurisdiction over the fraud that caused Mrs. Connell to lose her non-securities along with her securities.

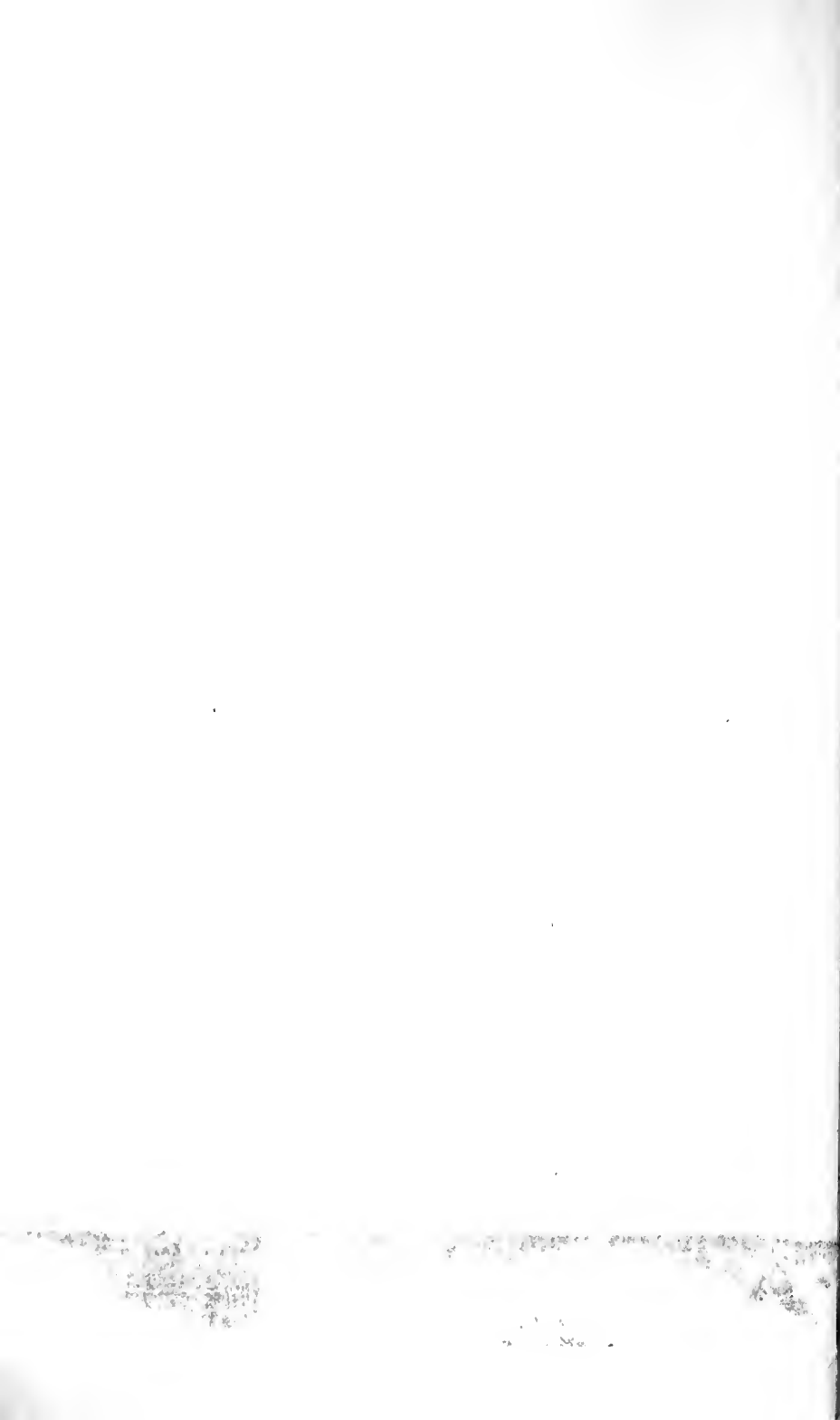


Armstrong Paint v. Nu Enamel Corp. (1938)
305 U.S. 315, 83 L.Ed. 195

Hurn Oursler (1933) 289 U.S. 238, 77 L.Ed. 1148

However, "pendent" jurisdiction is not alone confined to copyright and trademark cases, as prolific in this field, such decisions seem to appear. Leading in other fields is Siler v. Louisville & N. R. Co. (1909) 213 U.S. 175, 53 L.Ed. 753 where the Supreme Court held that a Federal Court had jurisdiction to determine whether an order of a state railroad commission violated the Federal Constitution, and having taken jurisdiction to determine that federal question (in a non diversity case such as here) it had "pendent" jurisdiction to determine the lawfulness of the order under state or local law.

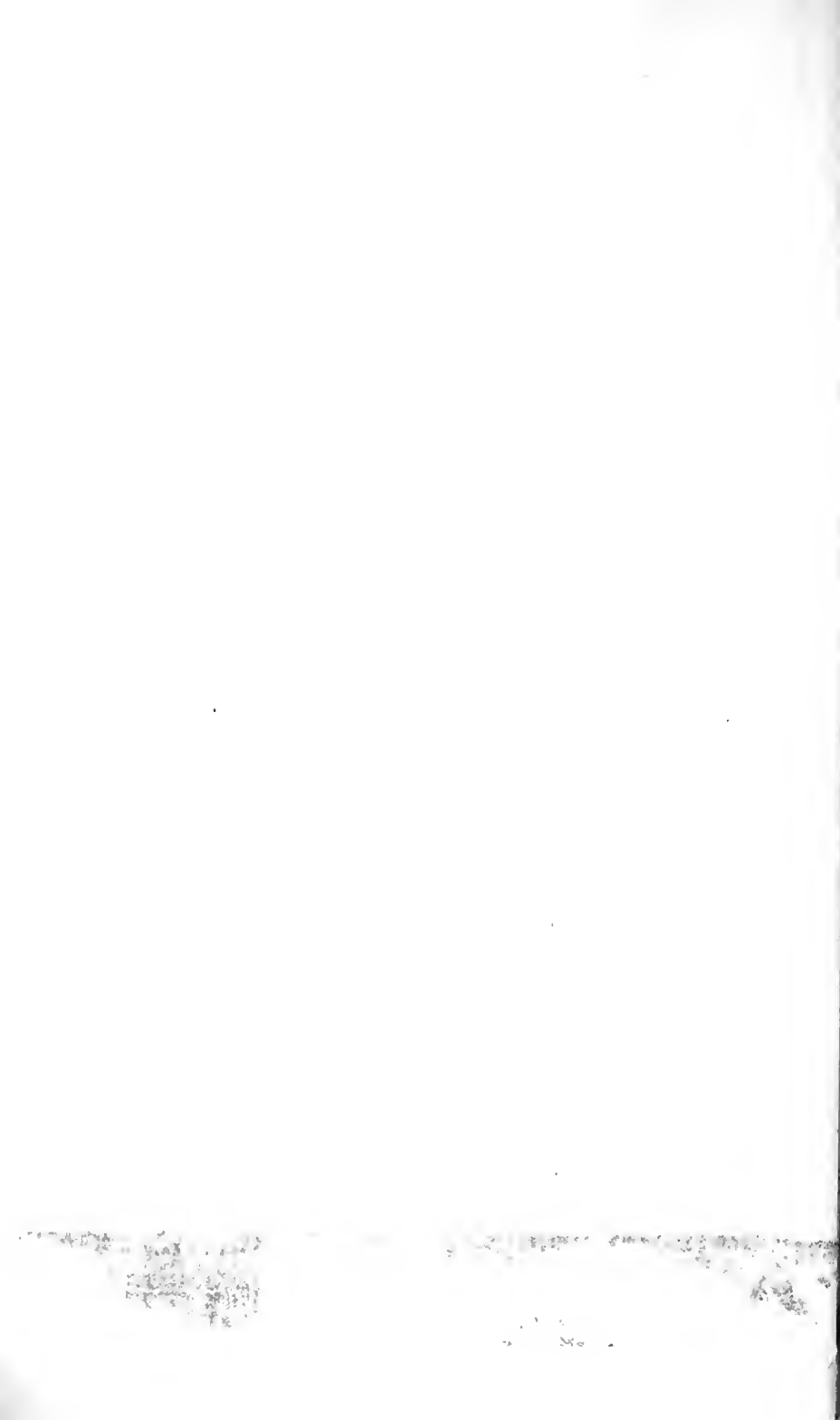
This Court in Southside Theatre v. United West Coast Theatre (9 Cir., 1949) 178 F.2d. 648 recognized the jurisdiction of a District Court in an action for declaratory relief to determine not only the federal question of whether a particular contract violated the Sherman Act but also the non-federal question as to whether one of the parties had terminated the contract pursuant to its terms. Even the question as here presented as to whether or not Mrs. Connell's annuity and her three conditional sales contracts are securities within the meaning of the Securities and Exchange Act of



1934 is a substantial federal question justifying exercise of "pendent" jurisdiction to determine the remainder of the controversy -- federal and non-federal. Southern Pacific Co. v. Van Hooser (9 Cir., 1934) 72 F.2d. 903.

Some Courts have taken the view that the exercise of "pendent" jurisdiction is not mandatory but only permissible within the District Court's sound discretion. Strachman v. Palmer (1 Cir., 1949) 177 F.2d. 427, 12 A.L.R. 2d. 687; Fitzhenry v. Erie R. Co. (D.C.N.Y., 1934) 7 F. Supp. 880. If exercise of "pendent" jurisdiction in a proper case be discretionary, it becomes particularly appropriate for this Court to affirm the trial court's exercise of its discretion in taking hold of and deciding this entire, non-severable controversy involving a scheme to defraud Mrs. Connell of her entire wealth - securities and non-securities. Such discretion should not be disturbed on appeal. As Judge Clark so humanely expressed the practicality of exercising "pendent" jurisdiction in his dissenting opinion in Musher v. Alba Trading Co. (2 Cir., 1942) 127 F.2d. 9 at page 11:

"If the roast must be reserved exclusively for the Federal bench, it is anomalous to send the gravy across the street to the State Court House."

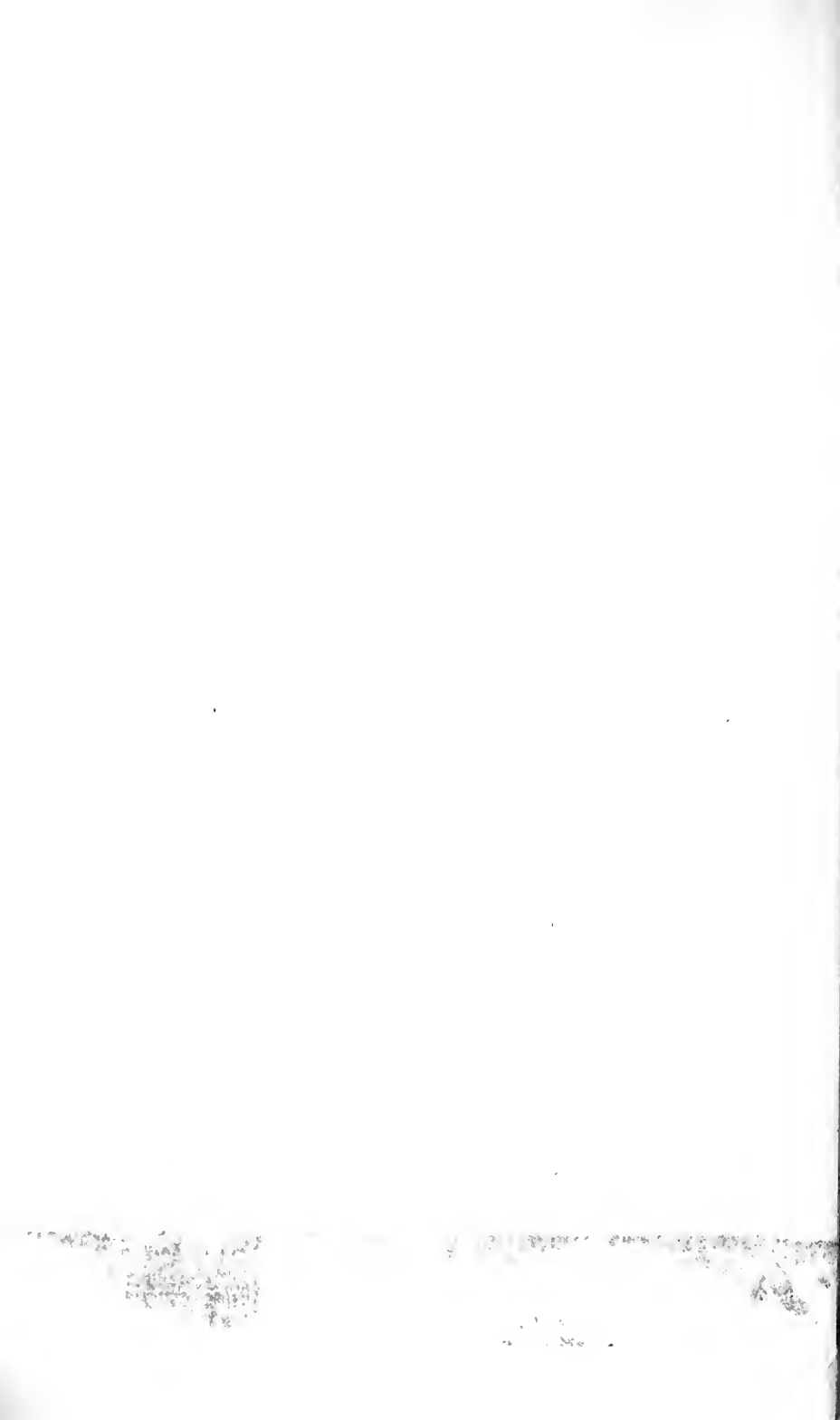


Court said in Marshall v. United States, (9 Cir., 1944) 146 F.2d. 618:

"...Direct evidence is rarely available to prove a fraudulent scheme or fraudulent intent. From the very nature of the offense, it must be inferred from the facts and circumstances of the situation in question. Clark v. United States, (9 Cir., 1942) 132 F. 2d. 538, 541; Gates v. United States, (10 Cir., 1941) 122 F.2d. 571, 575."

Nor, does a scheme to defraud necessarily end with the obtaining of a profit as the scheme is often continued to "lull" the victim into a sense of security or inaction and to delay detection of the fraud. Use of mails to carry out "lulling" activities is sufficient for jurisdiction. Marshall v. United States, (9 Cir., 1944) 146 F. 2d. 617, 621; Brady v. United States, (9 Cir., 1928) 26 F.2d. 400, 402.

Promises made and representations as to future events are competent evidence in proving a scheme to defraud. United States v. Grayson (2 Cir., 1948) 166 F.2d. 863, 866. Gross exaggeration of opinion respecting the value of land exceeds "puffing" and constitutes fraud. Holmes v. United States (8 Cir., 1943) 134 F.2d. 125. Even though a business be lawful in form and appearance such cannot be furthered by fraudulent representations. Stephens v. United States (9 Cir., 1930) 41 F.2d. 440, 445. "It is astonishing how many credulous investors there are in the world" Byron v. United



States (9 Cir., 1919) 259 Fed. 371. The fact that the scheme would not deceive one of ordinary intelligence does not relieve the wrongdoers. Tucker v. United States (6 Cir., 1915) 224 Fed. 833, 837.

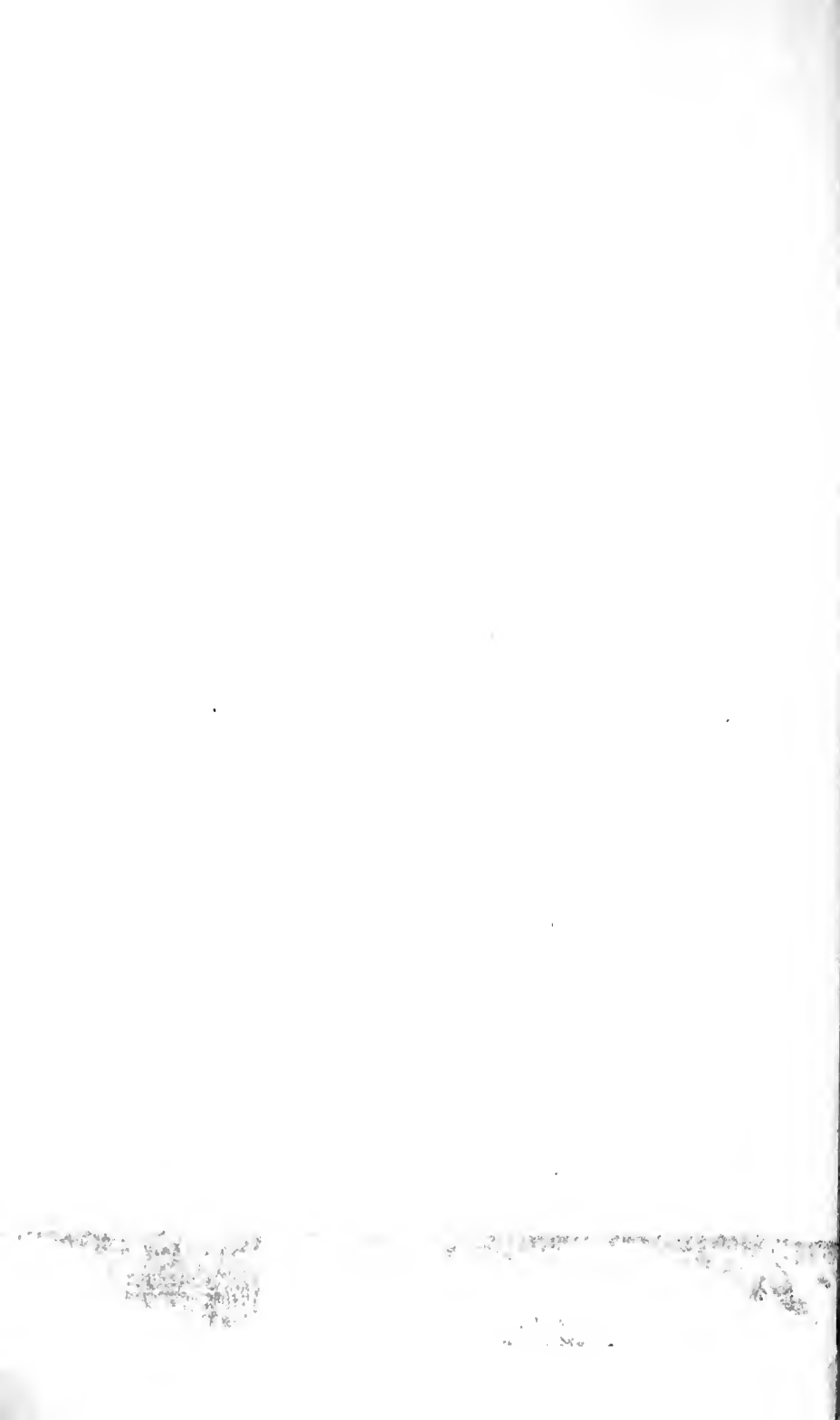
Jurisdiction is satisfied if any act or any trans-
action of the offending fraudulent scheme occurred in
the Western District of Washington (i.e. Seattle or
Vancouver, Washington) Sec. 27 of Act (15 U.S.C. #78aa);
Robinson v. Difford (D. Ct., Pa., 1950) 92 F. Supp. 145.
Neither logic nor the authorities support a proposition
that the entire scheme must be proven to have occurred
entirely within the confines of the Western District of
Washington. Without laboring our previous "Statement of
the Case" we pin-point several of the most important acts
of Appellants which occurred in the Western District of
Washington.

First, Errion sought out Mrs. Connell at her
Seattle home (T. 106) after which he called there on
numerous occasions (T. 126) and in fact made most, if
not all, of his fraudulent statements to her in her home
(T. 720, 176). Errion took Mrs. Connell's securities and
gave her his promissory note (Ex. A-3) in Seattle after
which Amy Errion sold the securities on her own account
in Seattle (T. 94); getting the money and converting it
into cashier checks in Seattle for delivery to Errion.
(T. 97, 665). Amy Errion typed documents for the trans-
action in Mrs. Connell's home at Errion's bidding (T. 161),



Dwight Holdorf presented the receipt document dated at "Seattle, Washington" (Ex. A-5) purporting to represent the principal transaction and delivered the deed to the tidelands to Mrs. Connell in her home (T. 221, 239). Errion arranged in Seattle for a Mr. Olson to sell the "Bogardus" contract (T. 484) and the "Rankin" contract (T. 492) as had been taken from Mrs. Connell. Violet Kellerstrass sold the residential property at 811 14th Avenue North, in Seattle and converted the funds into cashier checks in Seattle (T. 567) and also made a deposit in Holdorf's bank account in Vancouver, Wash. (Ex. 25). Dwight and Opal Holdorf at Errion's direction employed Seattle attorneys to create the Holdorf Oyster Corporation and then turned the stock over to Errion in Seattle (T. 676, 684, 790). Even during "lulling" activities, Errion conversed with Mrs. Connell at Seattle although by then he was staying mostly away from there and some transactions with Mrs. Connell occurred in Portland, Ore.

It is difficult for us to see how Appellants could have the temerity of contending that no act or transaction violative of the Securities and Exchange Act or Commission rule occurred in the Western District of Washington. The conspirators all came fleetingly from Oregon to Seattle; perpetrated the fraud in Seattle; consummated the purchase and sale in Seattle; liquidated



the "loot" in Seattle and then retired to Oregon and conducted their "lulling" activities, in many instances, by remote control.

Action is NOT barred by either the Statute of Limitations or Laches.

The applicable statute of limitations is Rem. Stat., Sec. 159(4) of the State of Washington which provides that in cases of fraud the action must be commenced within three years from the time of discovery of facts constituting the fraud. Fratt v. Robinson (9 Cir., 1953) 203 F.2d. 627; Osborne v. Mallory (D. Ct., N.Y., 1949) 86 F. Supp. 869.

The trial Court found as a fact that Appellants had conducted "lulling" activities which had prevented Mrs. Connell from discovering facts which would have revealed to her the fraud which she did not discover until well within three years prior to the commencement of her action and that she was not in fact guilty of laches (T. 134, Vol. 2).

The Court's finding is well supported by the evidence. Although the sale of securities was consummated on October 19, 1949 and this action not commenced until three years, ten months and 12 days later, Mrs. Connell's normal opportunity of discovering the fraud within ten months and 12 days following such sale was prevented and frustrated by the "lulling" activities of

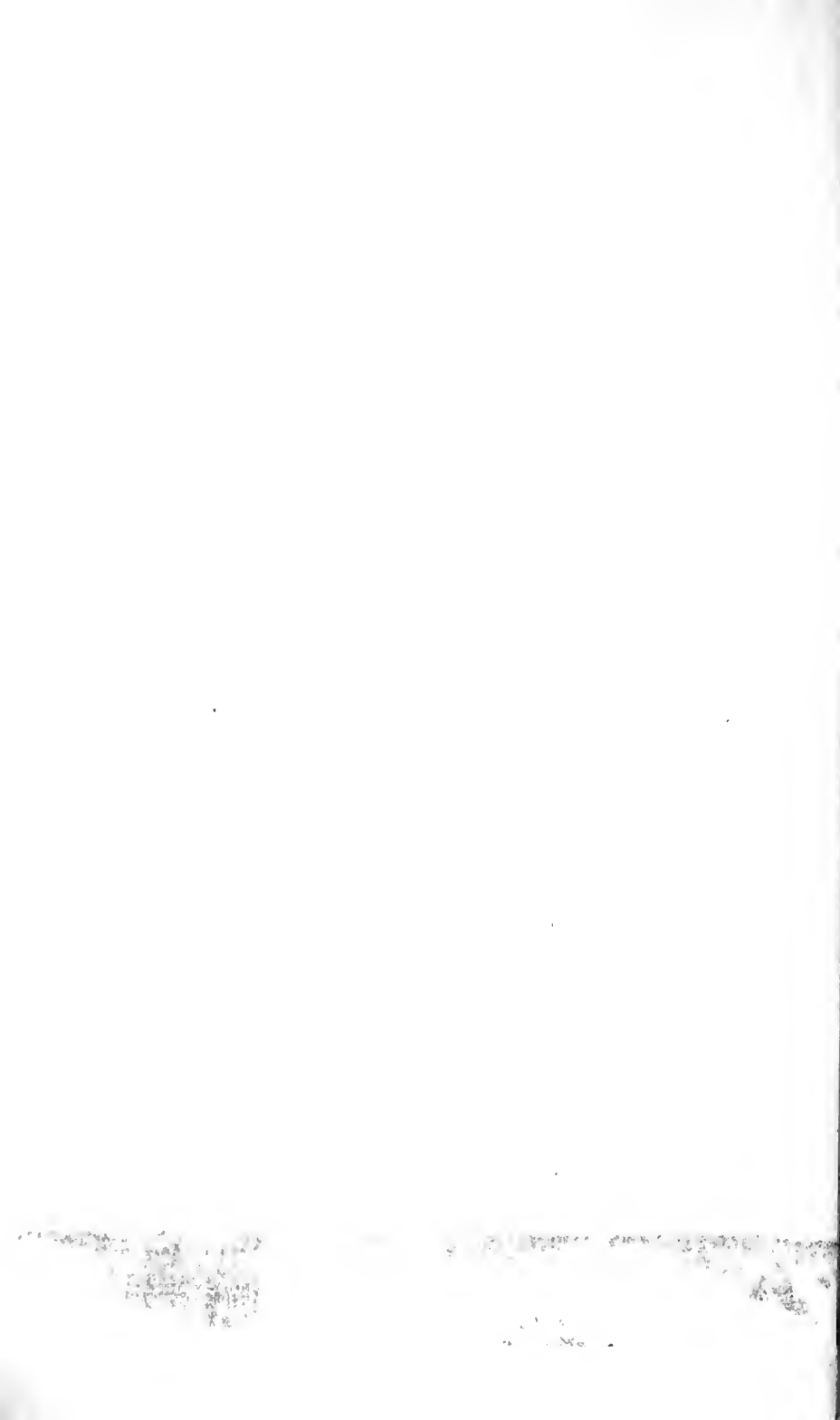
the conspirators.

The very nature of the scheme frustrated an early discovery. She and Errion were supposed to await outcome of the condemnation action by the Port of Coos Bay; expected to be finished within a year (T. 113). As Mrs. Connell testified (T. 132):

"We just held our breath until this suit was to be finished."

On top of the very nature of the scheme is the fact that from the very beginning Errion told Mrs. Connell to stay away from Coos Bay, Ore. so she wouldn't upset the apple cart (T. 133). Coos Bay, Ore. was the only place where Mrs. Connell could have gone to find out the truth about the worthlessness of her newly acquired "Oyster" lands. It was not until the summer of 1953 that she actually got down to Coos Bay, Ore. to inspect the lands (T. 193). Errion also told her at the very beginning not to interfere with the "plan" by talking with others about the transaction; particularly lawyers. (T. 223, 249). Mrs. Connell believed implicitly in Errion (T. 110). It was not reasonable to expect this aged widow residing in Seattle to make any kind of an investigation immediately after the transaction or during the early part of the scheme.

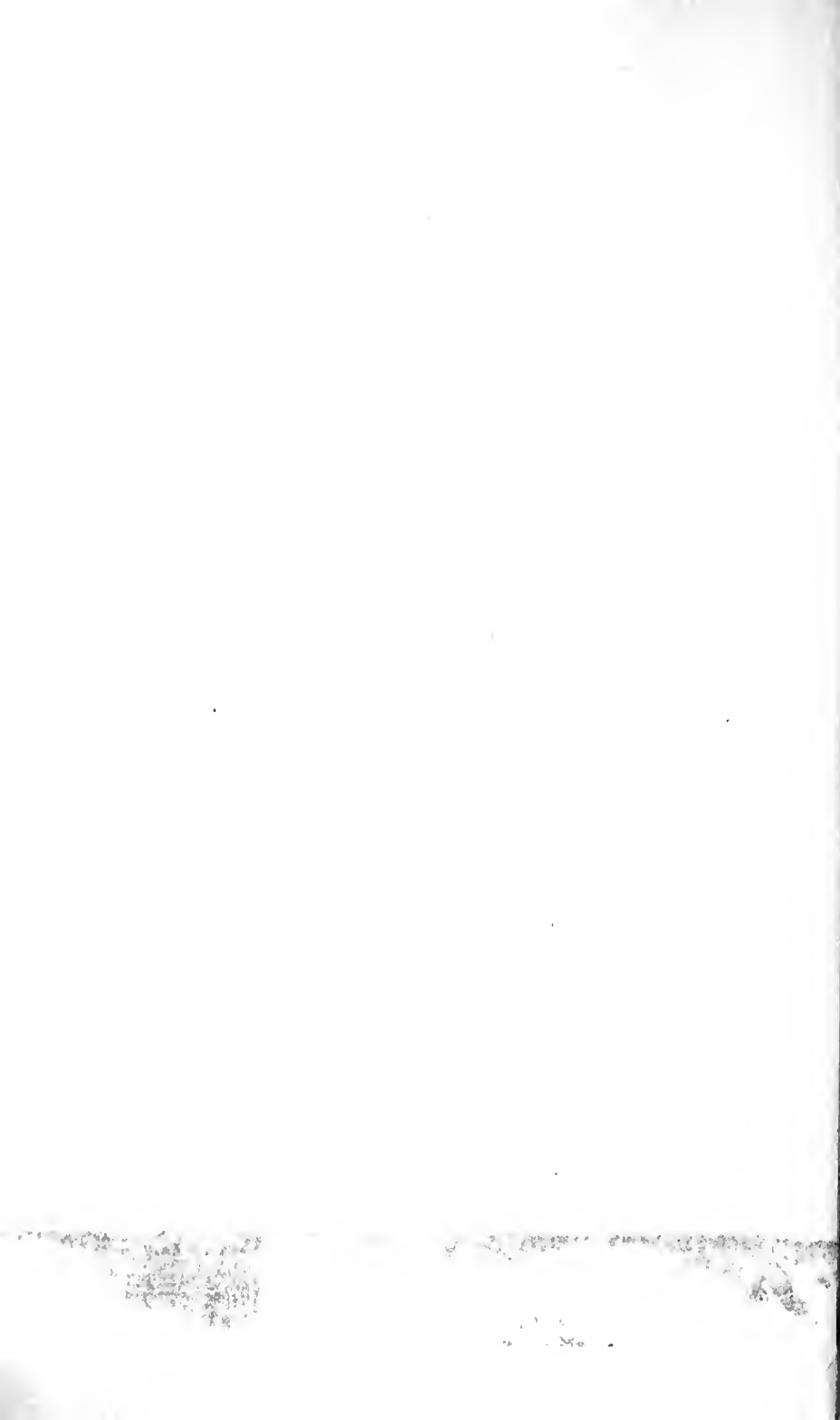
Of course, at Errion's suggestion (T. 117), Mrs. Connell and Amy Errion took a sojourn to southern California commencing in July of 1950 and extending until



Christmas Eve of 1950. Being in southern California with Amy Errion for the last half of 1950 certainly hampered, if not prevented, any investigation that Mrs. Connell could have made even had she had reason to become suspicious. The Court found that this southern California trip was for the purpose of hindering Mrs. Connell from discovering the true facts concerning her transaction (T. 123, Vol. 2). While no defendant directly admitted that such was the purpose of the trip, the Court was fully justified in drawing such inference from the evidence and so finding.

The first time it could be said that Mrs. Connell should have undertaken to investigate and learn the truth of the transaction was in Los Angeles on December 14, 1950 when Errion first advised that the condemnation action of the Port of Coos Bay, had been dismissed. However, that date is well within three years next preceding this action which was filed August 31, 1953.

It is suggested by Appellants in their brief that Mrs. Connell should have been put on inquiry when she took Errion's promissory note (Ex. A-3), believing it a receipt, and that had she shown it to anyone, the document could have been explained to her and she be alerted to the probability of fraud. Of course, Appellants overlooked mentioning that this promissory note dated September 12, 1949 was promptly taken back from her by



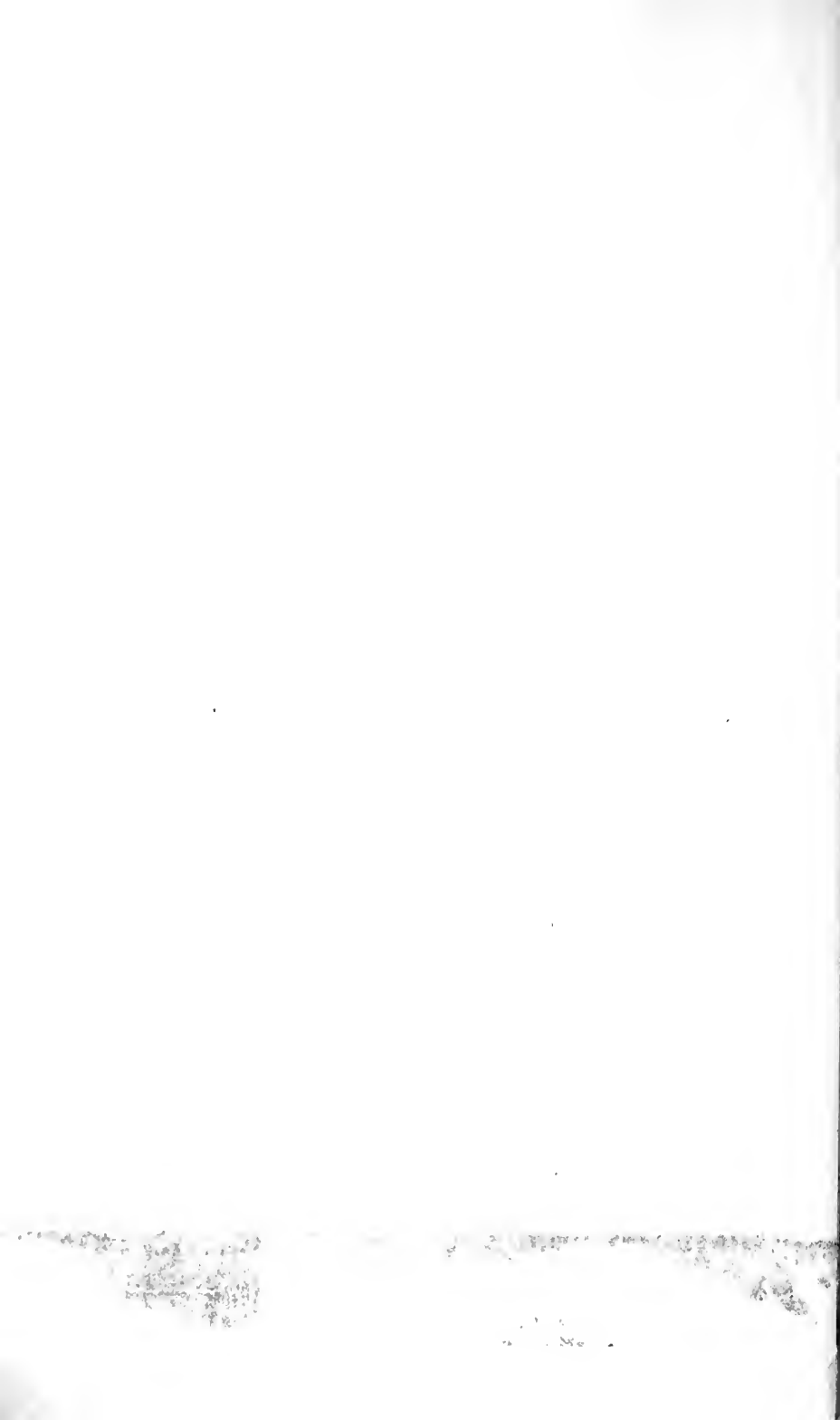
the conspirators on or before October 19, 1949 (Ex. A-5). The conspirators treated the note as a receipt, as Mrs. Connell in the first instance had understood and she never had possession of the note long enough to show it to anyone.

Appellants do not go far enough when relying upon In Re Sackman's Estate, 34 Wn. 2d. 864, 210 P.2d. 682, which merely enunciates a familiar principle of law that discovery of fraud dates from when a victim by the exercise of due diligence could have discovered the fraud; not when actually discovered at a later date.

Another equally important and pertinent principle is that action taken by defendants to hinder or impede discovery tolls the time when a plaintiff is charged with constructive knowledge of the fraud. This doctrine of fraudulent concealment is recognized by the Supreme Court of the State of Washington. In Johnston v. Spokane R. Co. (1919) 104 Wn. 562, 177 P. 810 the Court said: (p. 570)

"And mere silence is not sufficient concealment of fraud to interfere with the running of the statute of limitations where the facts are readily ascertainable. There must be some hindrance or impediment interposed or some fraudulent concealment by the defendant to have that effect. Sackman v. Campbell, 15 Wash. 57, 45 Pac. 495; Kline v. Gailand, supra. (53 Wash. 504, 102 P.440)

Likewise, the District Court for the Western District of Washington made the same observation of



Washington law in Johnson v. Chicago N. & St. P. Ry. Co.
(D. Ct. Wash. 1915) 224 Fed. 196 at page 201:

"It is fundamental that where plaintiff is prevented from bringing action through fraud, concealment, or deceitful conduct of the defendant, the bar of the statute does not operate until discovery."

Any statement, word or act which tends to the suppression of the truth, renders the concealment fraudulent. Hickok Producing & Development Co. v. Texas Co. (5 Cir., 1942) 128 F.2d. 183. Acts of concealment need not be subsequent to the accruing of the cause of action but may be coincident or even prior to it provided there is a relation or design to consummation of such acts.

Overfield v. Pennroad Corp. (3 Cir. 1944) 146 F. 2d. 889. For example, where a defendant misrepresents the value of land sold to a plaintiff and at time of sale induces the plaintiff to keep the transaction a secret, it has been held that such action is fraudulent concealment sufficient to toll date of constructive discovery. Max v. Cutting (1849) 20 N.H. 187 (memo in 173 A.L.R. 582, at 609). Where a defendant subsequently falsely re-assures plaintiff as to quality of land sold such is sufficient affirmative concealment to prevent the Statute of Limitations from running. Al Parker Securities Co. v. Owen (Texas Com. App., 1928) 1 S.W. 2d. 271.

Whether Appellants in the case at bar made affirmative statements or acts which impeded or prevented

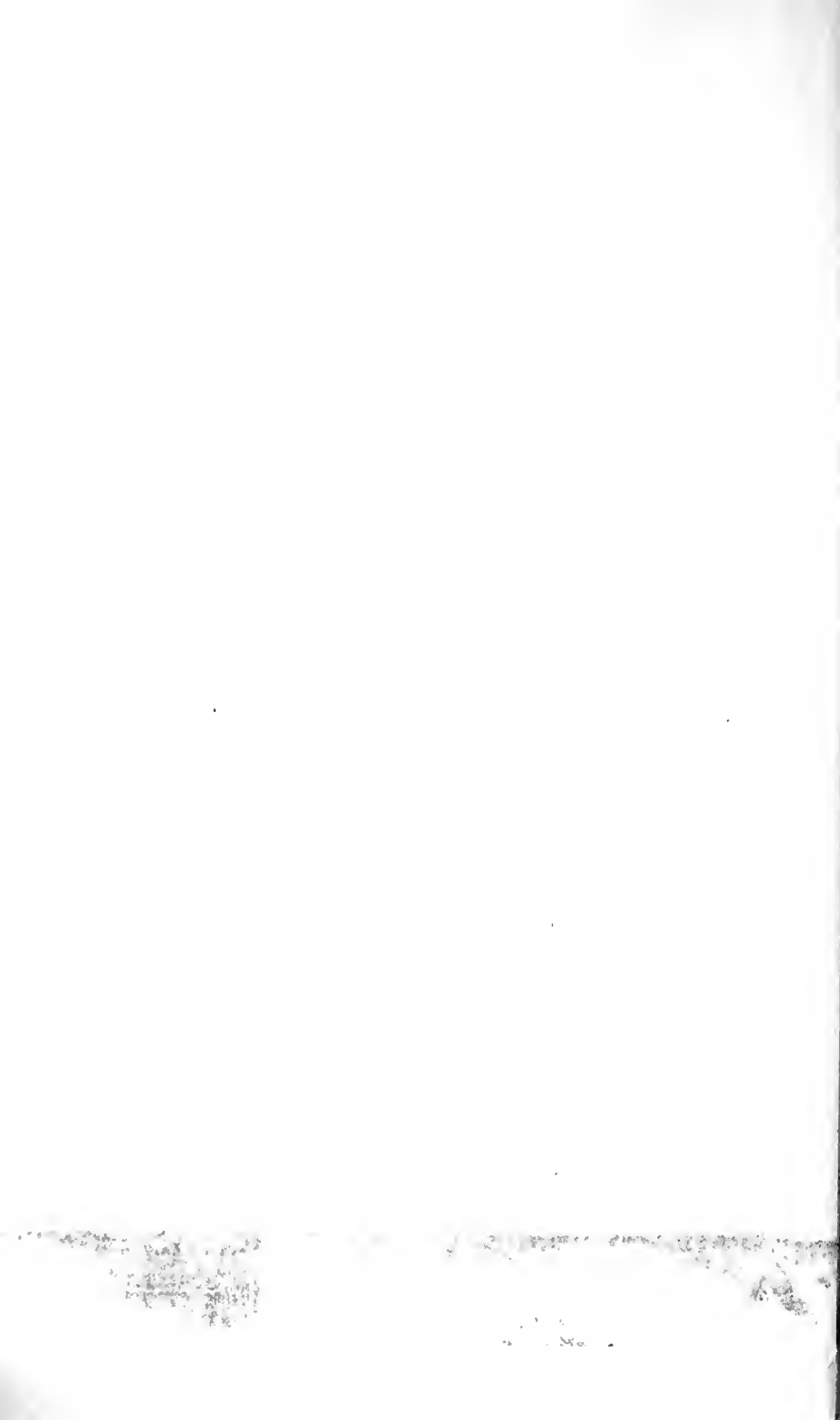


Mrs. Connell from earlier discovering the fraud is a question of fact to be determined by the trial Court from all of the surrounding circumstances and personal characteristics of the parties involved in this particular case. Cornwall v. Anderson, 85 Wn. 369, 148 Pac. 1. The crafty and experienced Appellants versus a 74 year old widow; representation in Seattle of "Oyster" land in Coos Bay; nature of scheme; advised to stay away from Coos Bay; advised not to talk about the transaction with others; and a six months trip with Amy Errion to southern California fully support the trial Court's findings No. 28 of the ultimate fact that Mrs. Connell did not discover or have reason to have discovered facts that would reveal the fraud until well within the three year statutory period.

Such finding as made by the trial judge who listened to the testimony and observed the witnesses should not now be disturbed on appeal. Finding No. 28 (T. 134, Vol. 2) stating the ultimate fact of time of discovery stands in mutual support with Findings Nos. 19 and 21 (T. 123, Vol. 2) pertaining to some of the early "lulling" activities or affirmative acts of concealment.

Appellants are in error in contending that the trial Court's findings are not supported by the evidence.

It is contending that the findings are not supported

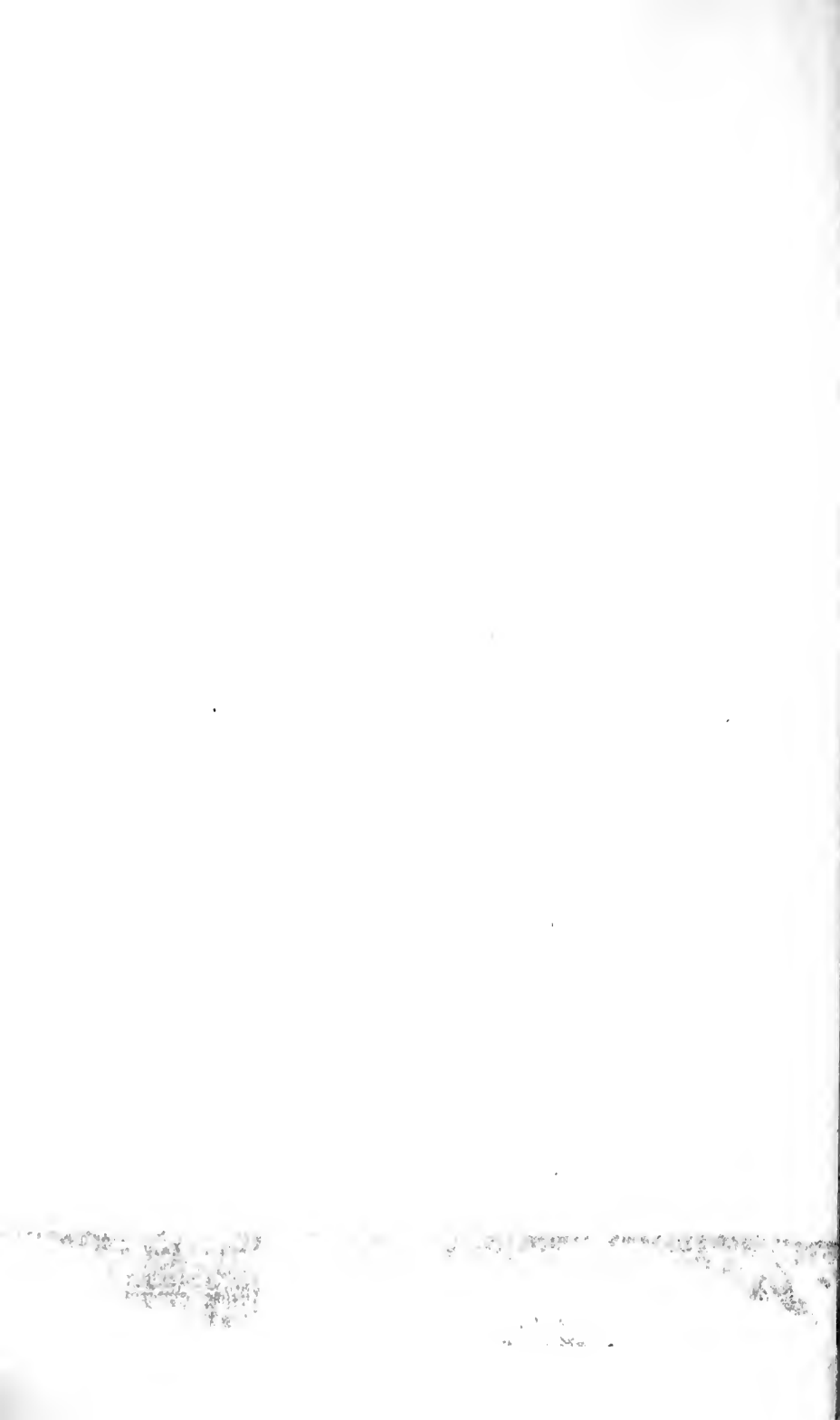


by the evidence, Appellants are content merely to assert that Mrs. Connell's case is predicated upon common law fraud; that fraud is "odious" (as Mrs. Connell has discovered) and that it must be proven by clear and cogent evidence.

In no respect have Appellants undertaken their task of pointing out specifically where or how Mrs. Connell has failed to sustain her burden of proof. It is not incumbent upon either this Court or Mrs. Connell to pick up Appellants' "laboring oar".

As to burden of proof a violation of Sec. 10(b) or Rule X-10B-5, even if short of the common law criteria of fraud is sufficient to establish Mrs. Connell's case so far as it relates to securities. Norris & Hirschberg, Inc. v. S.E.C., (D.C. Cir., 1949) 177 F.2d. 228; Charles Hughes & Co. v. S.E.C., (2 Cir., 1943) 139 F.2d. 434; Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104. Since the non-securities are so inextricably comingled with the securities in this single fraud we believe the same burden of proof would suffice for them as well.

In any event, we do not see it necessary for this Court to determine the niceties of the two criteria of proof as we are convinced that the findings of the trial Court are supported by clear and cogent evidence which shows a fraudulent scheme that offends the common law

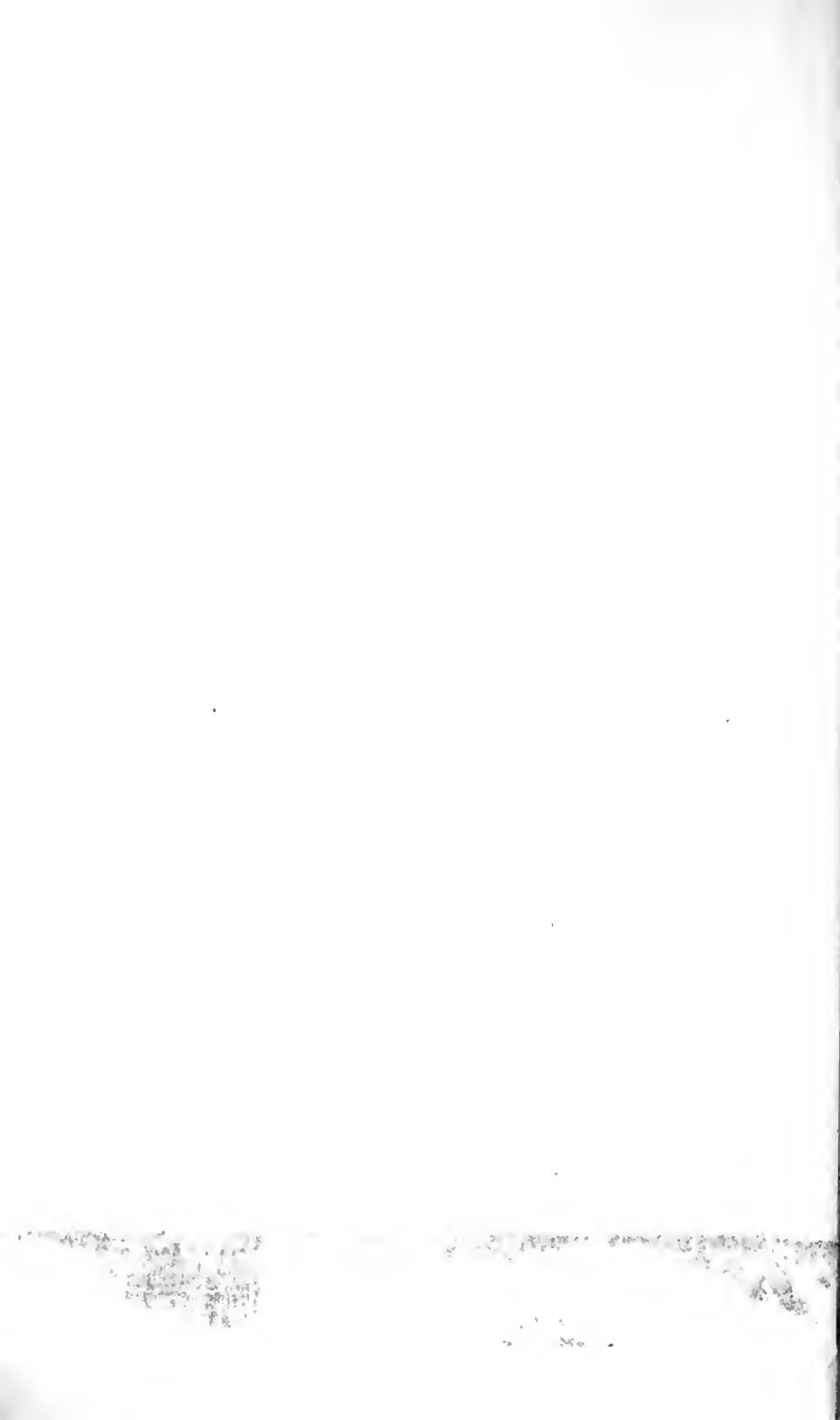


order to make statements as made, in the light of the circumstances under which they are made, not misleading can constitute fraud apart from any Rule X-10B-5. Equitable Life Ins. Co. v. Halsey, Stuart & Co., 312 U.S. 410, 668, 85 L.Ed. 920, 929, reversing 7 Cir. 112 F. 2d. 302.

In a case involving conspiracy and a fraudulent scheme, such as we have here, the burden of proof can, as is often necessary, be met by circumstantial evidence. Such evidence is not only sufficient but in most cases it is the only proof that can be adduced. Rea v. State of Missouri (1873) 84 U.S. 532, 21 L.Ed. 707 at page 710; Wynne v. Boone (D.C. Cir., 1950) 191 F.2d. 220 at page 222. The inference of fraud is often gathered from a chain of circumstances and common sense. Connolly v. Gishwiller (7 Cir., 1947) 162 F.2d. 428, 433. It is also well established that conspiracy can be established by circumstantial evidence. Borgia v. United States (9 Cir., 1935), 78 F.2d. 550, 555; Patti v. United States (9 Cir., 1927) 17 F. 2d. 562.

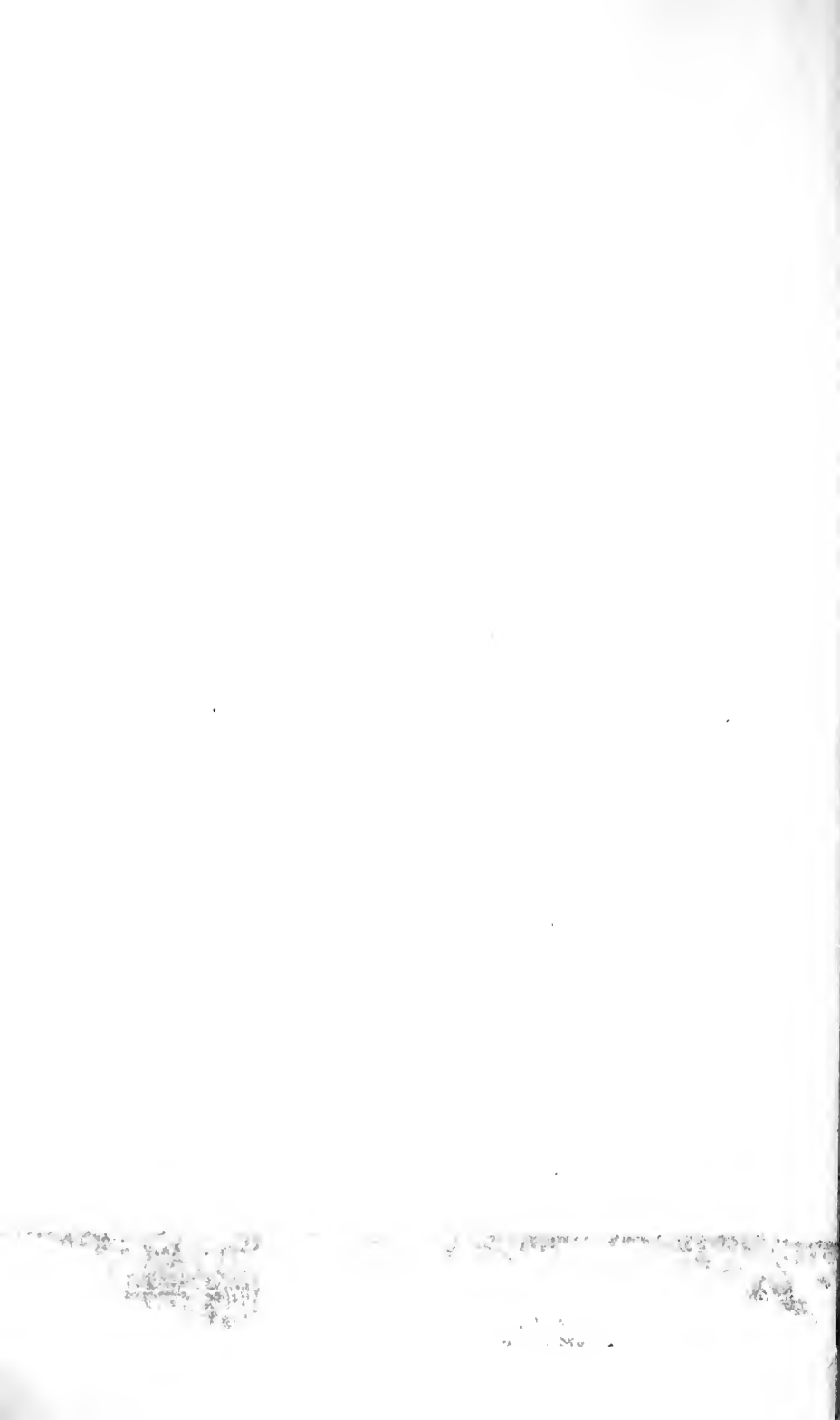
The case as to each of the Appellants must be measured with the view that they all acted in concert in carrying out a scheme for the unlawful purpose of defrauding Mrs. Connell.

As to AMY ERRION, she acted as Errion's secretary and typed pertinent documents (T. 161); took Mrs. Connell



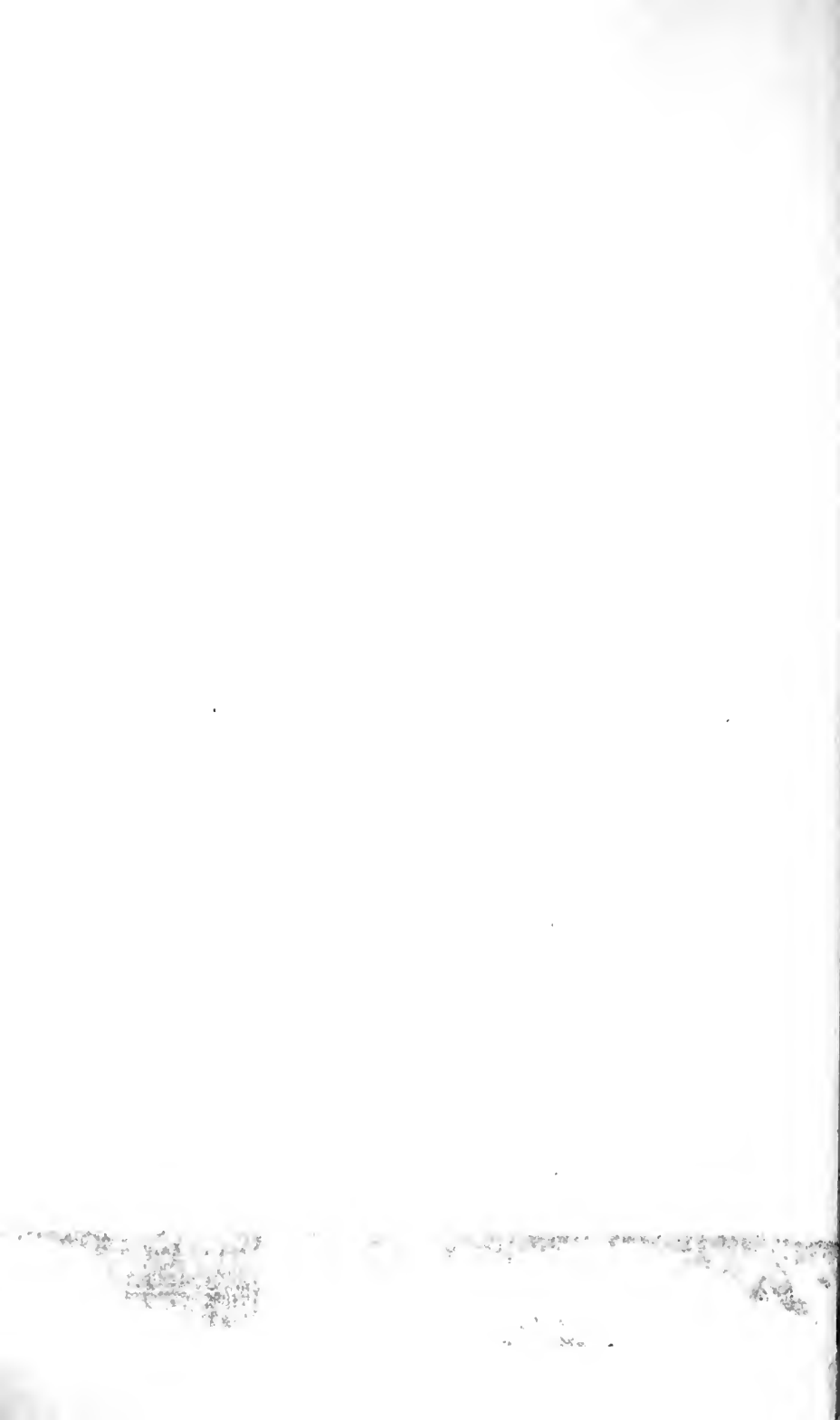
to southern California for six months at Errion's bidding (T. 117); sold the corporate securities of Mrs. Connell in Seattle (T. 94, 664); reduced the proceeds to cashier checks and gave to her husband (T. 665); and kept \$122.61 of the proceeds herself (Ex. 67; T. 668). In Los Angeles she paved the way by giving Mrs. Connell messages from Errion and was present when he induced her to sign the "Indenture of Lease" (T. 123). When Errion held business meetings almost every morning in his Portland apartment, Amy participated. (T. 284).

VIOLET KELLERSTRASS, as sister of Errion, was dependent upon him for support; lived in an adjoining apartment with companionway between and shared a single telephone (T. 572, 519). She took messages, wrote letters and kept records for Errion (T. 470, 284); opened a safe deposit box in 1949 in her name with Errion having a power of attorney to use (T. 576); and maintained a joint bank account in Portland with Errion and his money (T. 565, 585). When the property of Mrs. Connell's at 811 14th Avenue, Seattle was obtained, she took title in her name to conceal true ownership and "fronted" for the sale of same in Seattle (T. 566). She took \$11,400.00 net purchase price; converted it into cashier checks; converted the cashier checks into further cashier checks and then distributed all of it in a confusing series of deposits partly to Holdorf's account



in Vancouver, Washington bank and partly to the joint account which she had with Errion in a Portland bank. (Study of Ex. 35, 18, 13, 14, 15, 19, 20, 21, 22, 28).

Appellant C. W. WILLIAMSON came into the scheme as a "front" in December of 1950 to effect the "lulling" of Mrs. Connell. His actions clearly bring home the unlawful purpose of the entire conspiracy. Although on May 31, 1953 he wrote Mrs. Connell (Ex. 79) to effect that Errion had nothing to do with his "Oyster" business; that he was unable to plant "oysters" as represented because of silt damage; he nonchalantly admitted on cross-examination that he had signed the "Indenture of Lease" at Errion's bidding; he had never seen the "oyster" land; never intended to cultivate oysters on it; knew nothing himself about the claimed silt damage; had no money to buy such land from Mrs. Connell; and that the \$22,500.00 which he forwarded to Mrs. Connell over a period of time to purchase part of such land came exclusively from Holdorf or Errion's alter ego, National Forest Products Corp. (T. 1043-1052). The exhibits show that each time he received money to pass on to Mrs. Connell, he retained part of it; \$750.00 on June 14, 1951 (Ex. 58, 59, 60, 52) and \$1,000.00 on January 15, 1952 (Ex. 46, 12). Without the knowingly false participation of C. W. Williamson, the entire fraudulent scheme would have exploded in December of 1950.



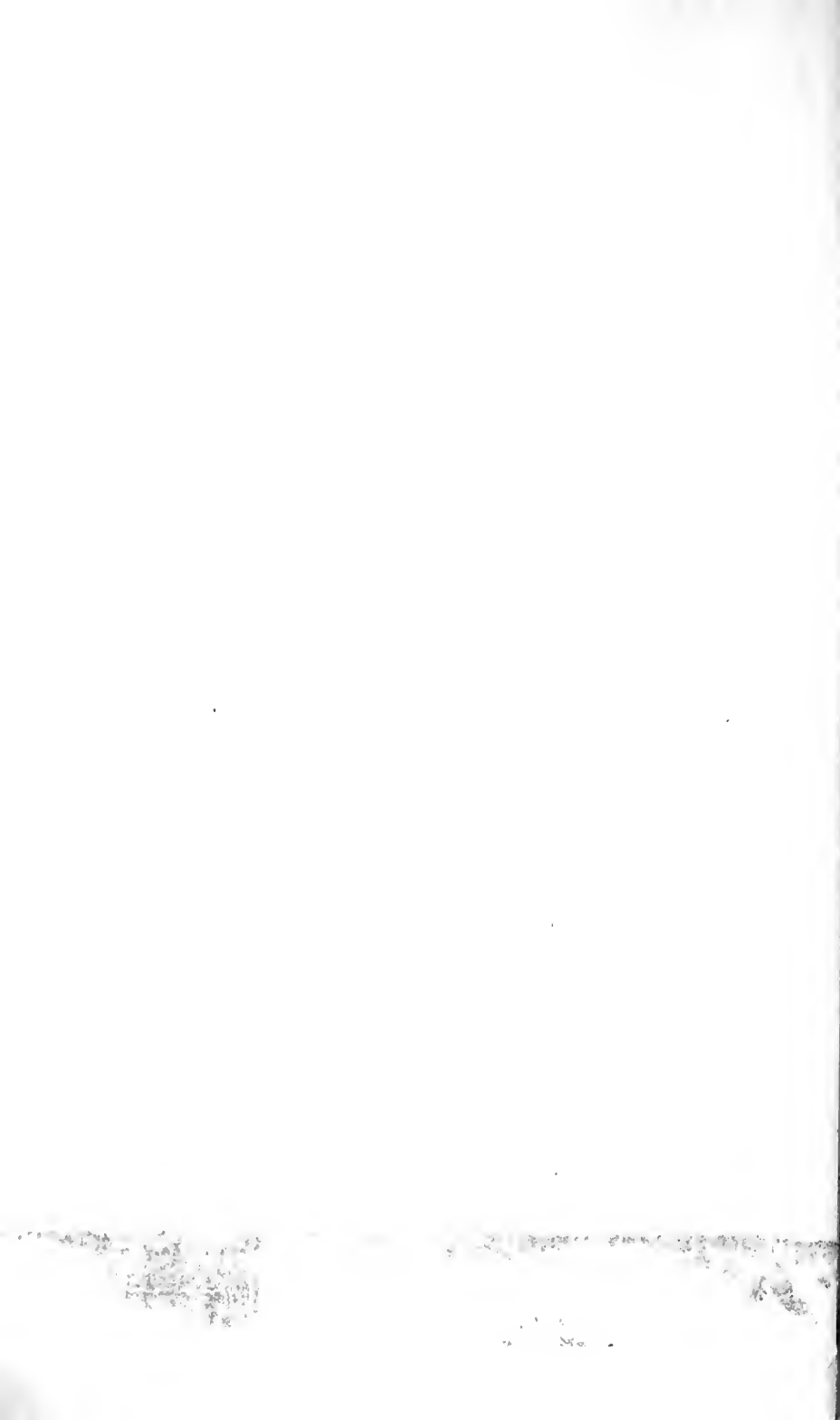
Appellant Errion was, of course, the center of the fraudulent scheme; he took the lions share of the "loot". Appellee's Statement of the Case amply shows his direction, organization and leadership in the fraudulent scheme.

In conclusion, we scarcely have to point out that even if Violet Kellerstrass and C. W. Williamson came into the conspiracy after the others and even after the principal transaction they are none the less "full fledged" conspirators and liable with the rest of them. Bogy v. United States, (6 Cir., 1938) 96 F.2d. 734, 740.

Mrs. Connell's part in relation to Port of Coos Bay condemning the "Oyster" land did not place her in pari-delicto with Appellants; hence no defense to this action.

We come now to the contention made by Appellants on page 31 of their brief to the effect that Mrs. Connell was in pari-delicto with Appellants in connection with their plan to "fix" values to detriment of the Port of Coos Bay. Our views coincide with those expressed by the trial Court in its oral opinion (T. 1068 at 1076).

Obviously, Mrs. Connell went passively along with the "plan" as outlined by Errion to "establish values" so that the Port of Coos Bay would be required to pay \$1,200.00 per acre for the property which was



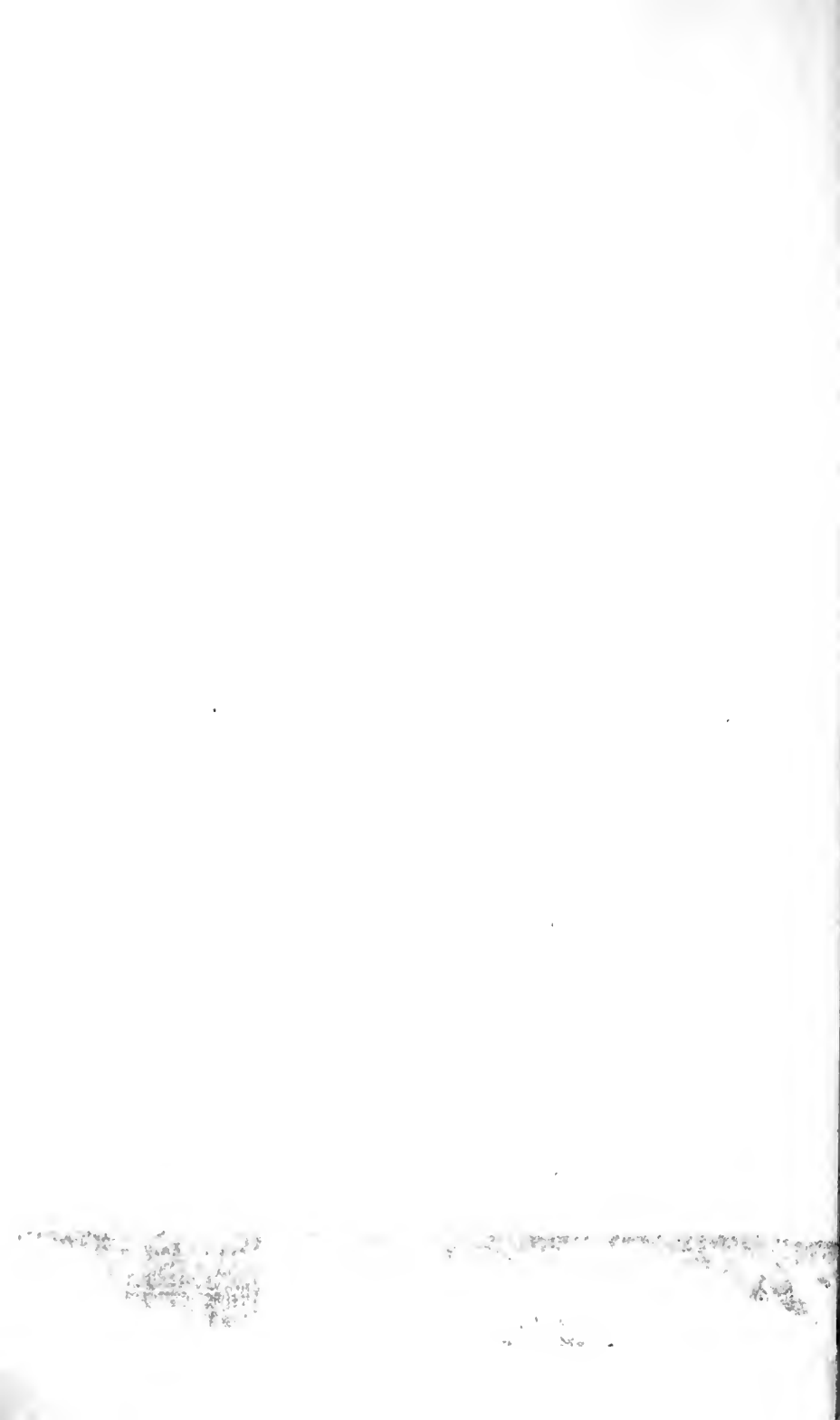
only worth \$100.00 per acre, otherwise Mrs. Connell would not have been defrauded. Such passive consent does not place Mrs. Connell in pari-delicto with Appellants.

Three significant facts appear: First, Mrs.

Connell thought she was exchanging for her securities, land worth \$1,200.00 per acre; only the Appellants had reason to know it was worth less than \$100.00 per acre. Second, although Mrs. Connell gave \$124,180.09 worth of securities and other property for 125 acres of "Oyster" land reputedly worth \$150,000.00, leaving the inference she was in the "plan" to make a profit, the amazing fact is that Appellants took back from Mrs. Connell her \$4,282.00 promissory note (Ex. 76, T. 980) for the difference in value between her securities and \$150,000.00. Third, the Port of Coos Bay voluntarily dismissed the condemnation action which they had commenced and no damage was suffered by the Port or anyone unjustly enriched.

A victim of a fraudulent scheme is not barred from seeking back that which was taken, merely because the scheme may have involved the victim in a plot to defraud another. Stewart v. Wright (1904) 130 Fed. 905, 918, affirmed in 147 Fed. 321.

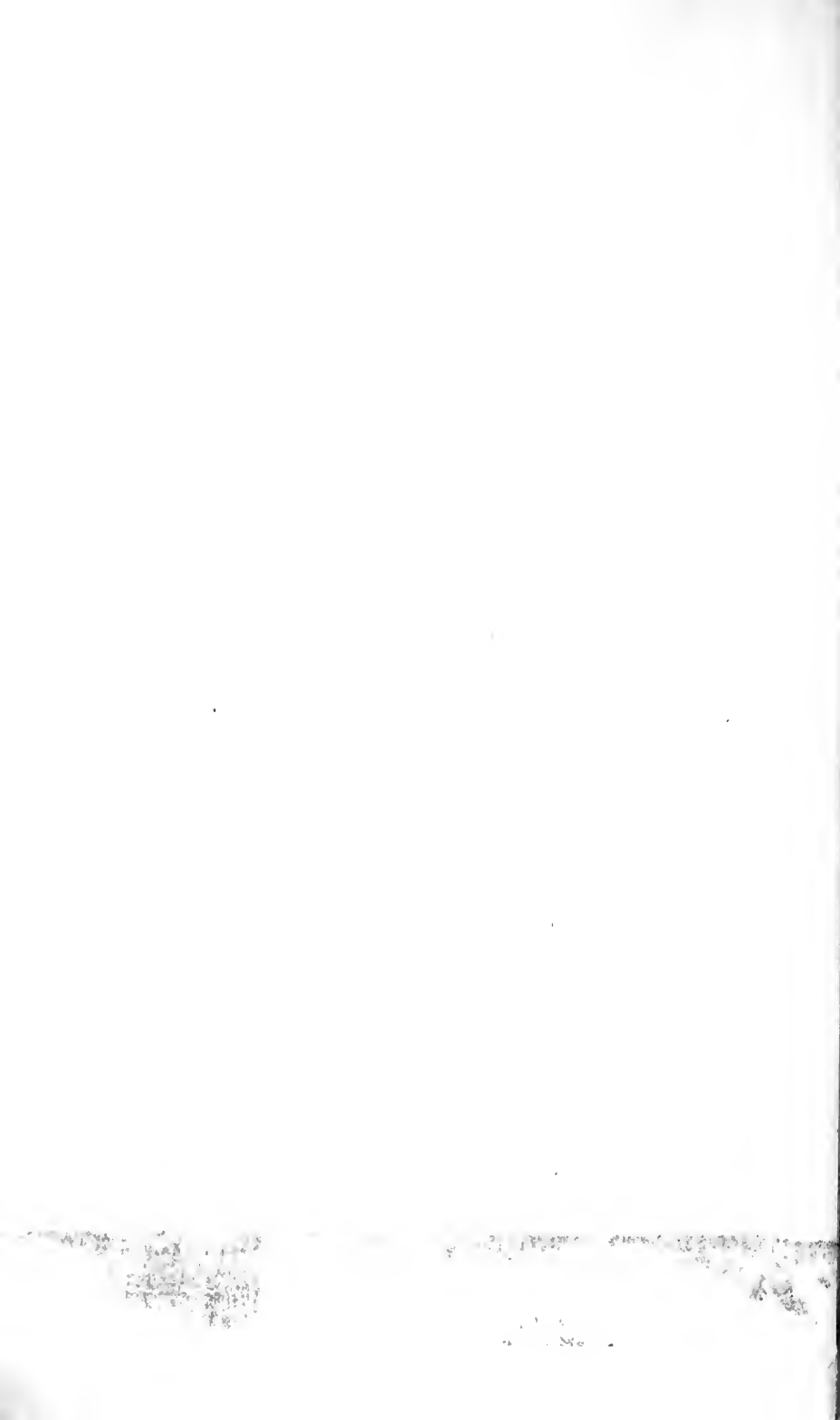
The case of Paddock v. Todd, 37 Wn. 2d. 711, 225 P.2d. 876 relied upon by Appellants is distinguishable from the case at bar because the plaintiff in that case by signing a false affidavit in a scheme with the



defendant had actually defrauded a corporation and benefited by the scheme.

As a general proposition, one who has entrusted money to another for an illegal purpose may recover it back so long as it has not been so used. Okeechobee County v. Nuveen (5 Cir., 1944) 145 F. 2d. 684, cert. denied in 324 U.S. 881, 89 L.Ed. 1432. See, also: "Money Entrusted for Illegal Use", 8 A.L.R. 2d. 307.

Many cases permit a fraud victim to recover by finding that although the victim might have been in delicto, in an agreement to defraud a third person, such victim was not necessarily in pari-delicto. Perhaps the most pointed decision of all is the 1857 decision of Pinckston v. Brown, 56 N.C. (Jones Equity Vol. III) 494 wherein an aged widow-mother was threatened to be sued on a note. She had an adult son who she relied upon very heavily. The son concocted the scheme of taking over all of his mother's assets in trust for all creditors except the holder of the note. The son had the mother list fictitious assets. The North Carolina Court in permitting the mother to recover back her property from the son's administrator (he having died) held that while the mother was in delicto in scheming to defraud the note creditor she was not in pari-delicto. The Court said:

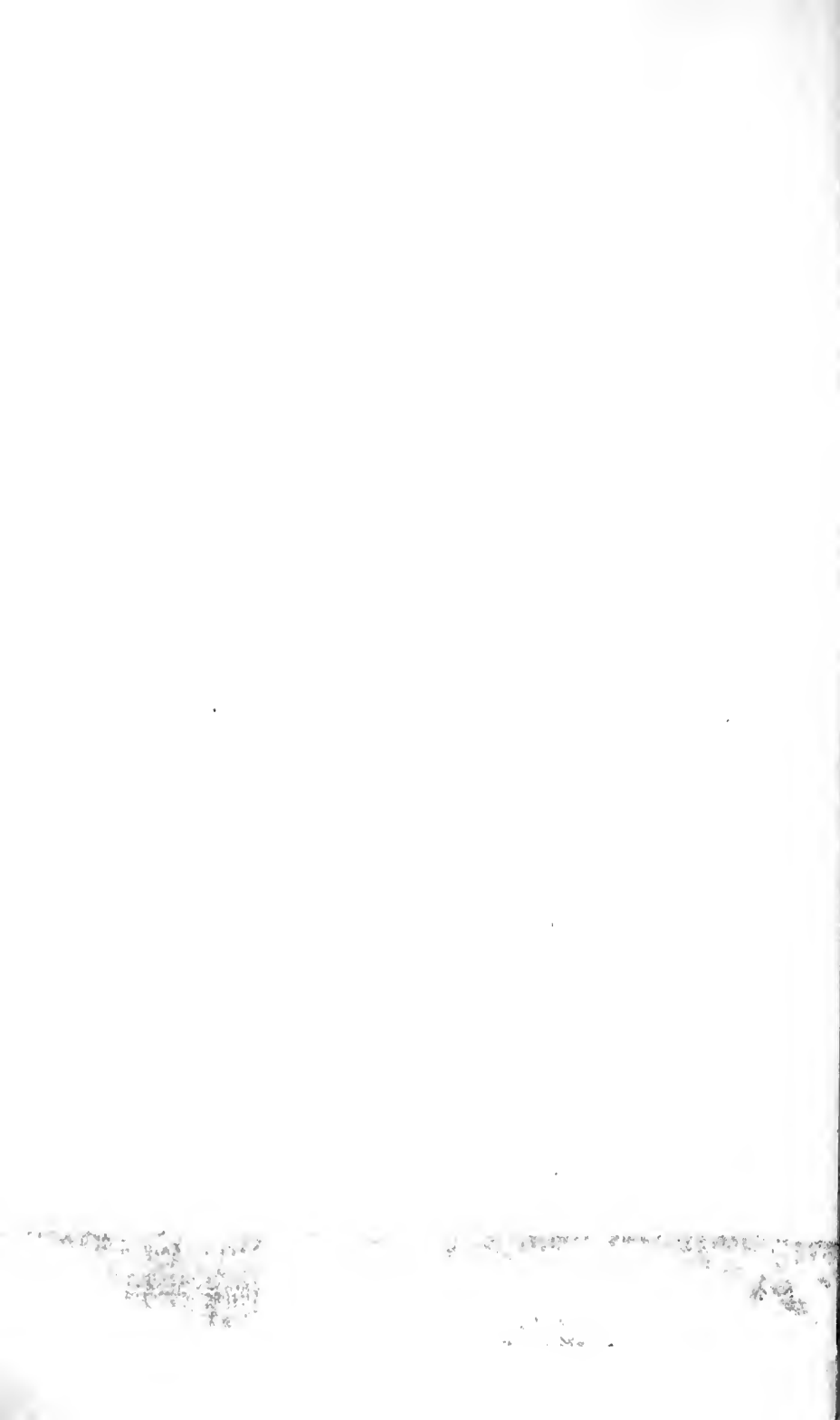


"Relief is not granted where both parties are truly in pari-delicto. For enforcing, however, this rule, it is not sufficient that both parties are in delicto, concurring in the unlawful act; they must stand in pari-delicto, for there may be other, and very different, degrees their guilt. Judge Story, in the 1st vol. of his Equity, section 300, says 'one party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition, or age, so that his guilt may be far less in degree than that of his associate in the offense.' In such cases the Court will grant relief in favor of a plaintiff who was particeps criminis as not being in pari-delicto. Such is the decision of the master of the rolls in Osborne v. Williams, 18 Ves. 382. The master observes, 'Courts of law and equity have held that two parties may concur in an illegal transaction, without being deemed in all respects in pari-delicto.' I consider this agreement as substantially the mere act of the son."

Trial Court soundly exercised its discretion in refusing to further delay Mrs. Connell's day in Court because of Errion's "battle fatigue".

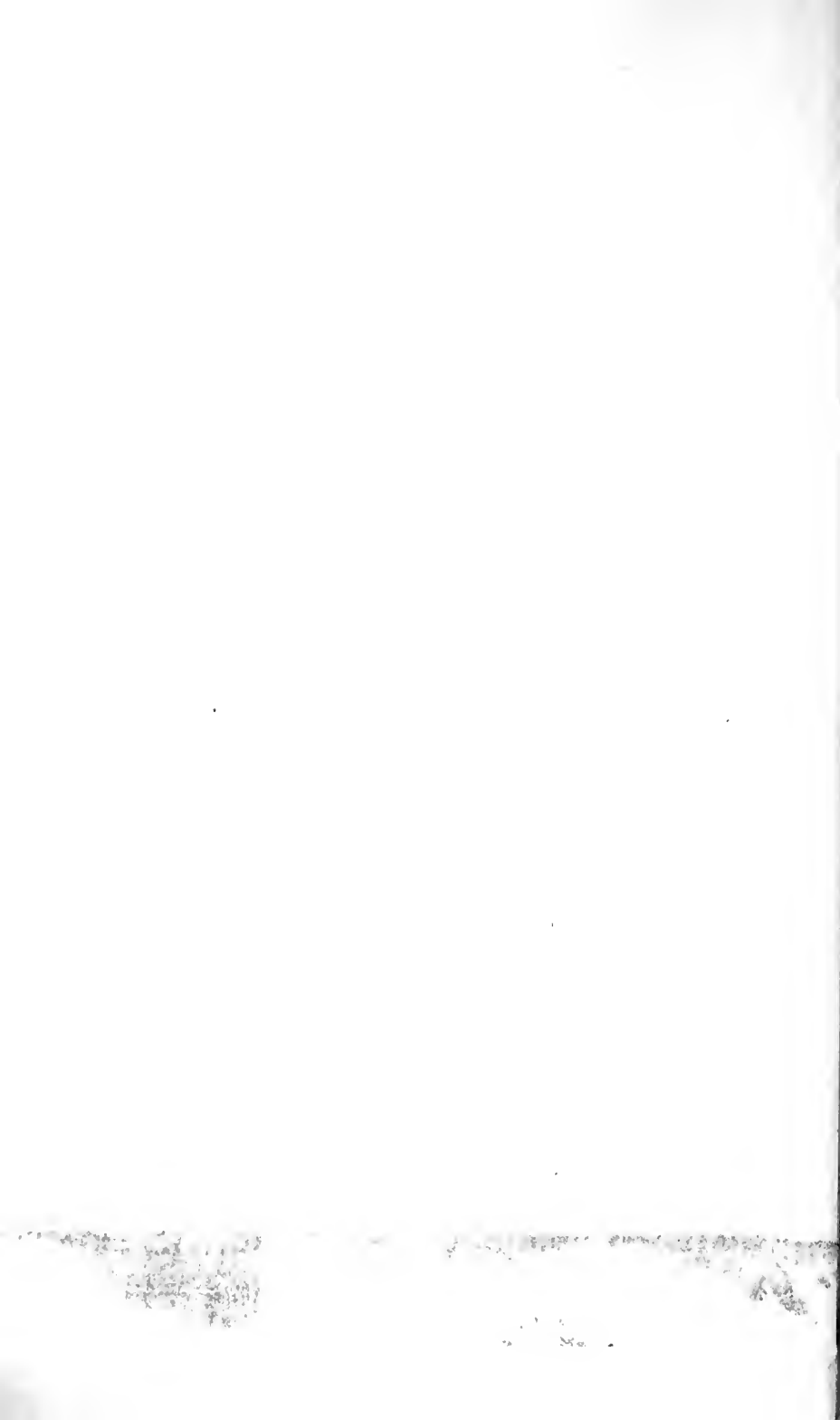
Collateral to the trial of this cause was the tactical battle of Mrs. Connell, age then 79 in seeking to get her day in Court in face of Errion's many delays obtained on basis of his alleged diabetic condition which he had since 1950 and his recently acquired "depression" described as comparable to "battle fatigue". (T. 76). This action was commenced August 31, 1953 and went to trial on November 3, 1954.

We have of record that prior to the trial, Errion could go down to his doctor's office; was seen in various places (T. 100, Vol. 2); met people in hotels; drove



his car and engaged in business other than litigation (T. 80). He just couldn't seem to get to Court. His psychiatrist, Dr. Herman A. Dickel of Portland, Oregon, testified that he was treating Errion for "depression" between April 15 and just prior to the commencement of the trial on November 3, 1954. He testified that although Errion's condition had improved, he, Dr. Dickel, could not state that Errion had made sufficient improvement to allow him to let Errion enter into any business activity (T. 74). As to this, the doctor frankly admitted he could not give an opinion and his expression would be more or less a "guess" as he had been unable to evaluate Errion's condition sufficiently to express an opinion (T. 72). When examined by the Court, Dr. Dickel was unable to say when, if at all, Errion's condition would be such as to permit him to appear at the trial (T. 81).

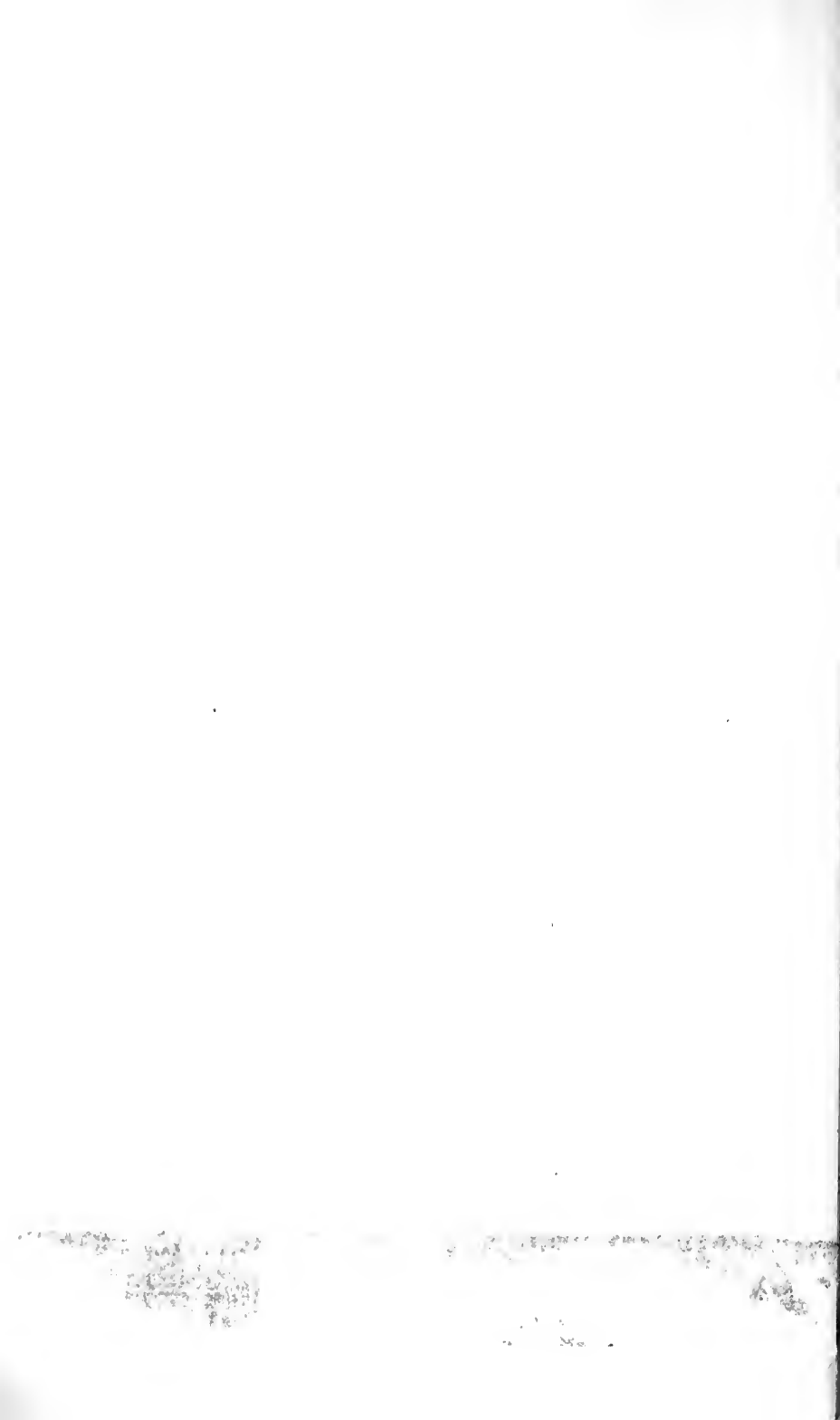
The trial Court was also faced with the consideration of according to Mrs. Connell, a 79 year old widow, her day in Court. While the prospect of attending trial was giving Errion "battle fatigue" the delay in not getting into the battle was affecting Mrs. Connell's health. By affidavit dated September 7, 1954 and presented to the Court, Dr. H. M. Landberg, a Seattle psychiatrist described Mrs. Connell's condition of health in part as follows: (Clerk's Item 133)



"The following is a summary of a psychological evaluation of Mrs. Marguerite Connell. The patient was seen on two occasions for approximately three hours. It appears that Mrs. Connell has a very keen and alert mind, with no particular evidence of mental deterioration. Her recollection of both past and recent events is quite good. Emotionally, it is found that she is in an extremely acute panic state which is super-imposed upon a chronic state of severe anxiety.....

"Two Factors are now producing her acute panic episodes which consists of a general mood of a hypo maniacal state, excessive verbosity, insomnia, extreme anxiety or nervousness and the unconscious desire to do anything and everything possible from having to possibly face the horrible reality with which she may be confronted. The above mentioned factors are, first, her having to realistically face being involved with some unscrupulousness of mankind and secondly the possibility of having to live in dire poverty. The degree of her emotional tenseness at present is exceedingly extreme and it is strongly urged and recommended that her present ordeal be culminated as rapidly as possible so as to alleviate the exciting causative factor and thereby possibly prevent her total collapse. It is quite obvious and apparent that she cannot much longer endure and exist in her present extremely turbulent emotional state."

Faced with the "battle fatigue" of Errion -- degree of which was highly uncertain and at best a "guess" on the part of his psychiatrist on the one hand, and, on the other a 79 year old widow with a chronic state of severe anxiety, who sought for over a year to get her day in Court, the trial judge in the exercise of his sound discretion refused to continue the trial or vacate the trial date. In fact, such decision of the trial judge was the only one which could be made in view of Errion's psychiatrist being unable to express an opinion as to when Errion could attend trial. The fairness



of the trial judge was further exemplified when he kept the door open for Errion's appearance at the conclusion of the taking of evidence on November 19, 1954 (T. 1057) and again on December 29, 1954 when the case was orally argued (T. 1067). It is significant that no move for Errion to appear was made pending motions for new trial filed January 26, 1955 and denied February 9, 1955.

The Trial Court did not err in denying motion of Violet Kellerstrass to quash service of summons.

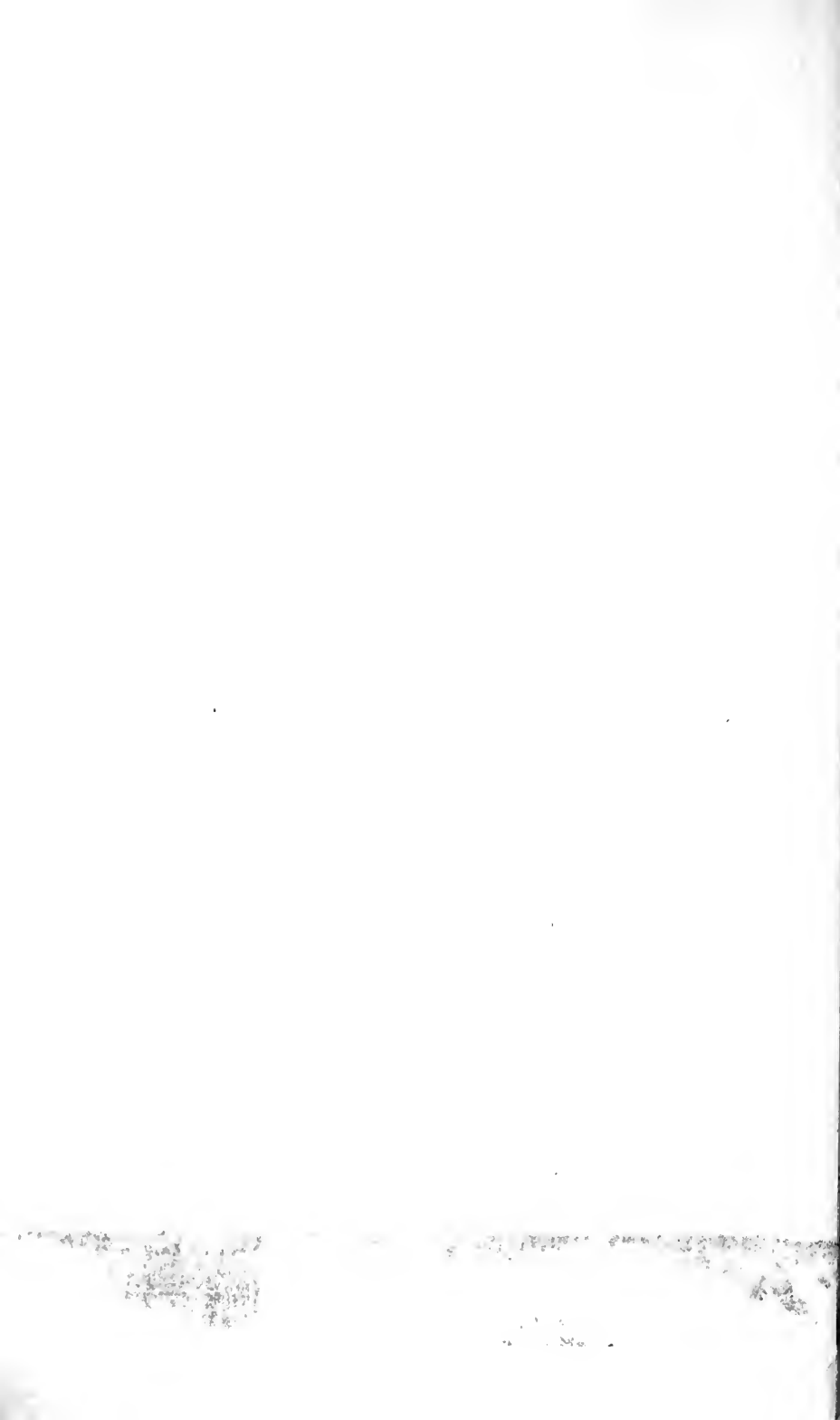
Appellant Violet Kellerstrass was served with summons and complaint at her ground floor apartment at 709 S. E. 16th Avenue, Portland where she resided with her brother, Fred Errion. Service was made by an experienced Deputy Sheriff of Multnomah County, Oregon who was specially appointed by the Court in this case to serve process (T. 36-38, Vol. 2). Process was served at about 7:30 P.M. on September 9, 1954.

As to manner of service, Sheriff Collacutt testified that he came to the front porch of her apartment; saw and recognized Mrs. Kellerstrass in the apartment; saw her step back into a back room as her brother, Fred Errion came to the open but screened door. When Fred Errion denied Mrs. Kellerstrass was in the apartment, he pitched the papers into the apartment through a hole in the delapidated screen door. He also verified that Fred

Errion lived in the same apartment and was over the age of 21 years (T. 544).

Violet Kellerstrass testified that she and her brother Fred Errion resided in the apartment; that during the evening in question she had gone to the apartment above to visit a friend and was not in her apartment until 10:00 P.M. at which time she saw the "papers" on the floor of the front room. She then testified she never picked up the papers or read them; didn't even "peek" at them; and that they were still on the floor. (T. 527-529).

The only objection which Appellant Violet Kellerstrass made at time of trial was that personal service had not in fact been made (T. 558). It is the only point urged on this appeal (Appellants' brief p. 34). Under the law of the State of Oregon, service is sufficient if the process is left at the residence of the party with a person of the family over 14 years of age. OCLA, Sec. 1-605(6). The Federal rule provides that summons and complaint may be served upon defendant "personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion." Rules of Civil Procedure. Rule 4(d). This was done. Furthermore, Rule 4(h) of the Rules of Civil Procedure provided that the Court at any time in its discretion may permit amendment of proof of service. This was in effect done by the Court



accepting the testimony of Sheriff Collacutt.

No prejudice resulted as no default was taken; it was stipulated that the answer of Errion be considered the answer of Violet Kellerstrass and she was present and testified at the trial.

SUMMARY AND CONCLUSION

With fast talk, ingenious false representations and a scheme every bit as much a breach of the common law as of Sec. 10(b) of the Act and Rule X-10B-5 of the Commission, Appellants induced Mrs. Connell to sell all of her securities and other property worth \$124,180.09 for 125 acres of tidelands worth less than \$12,500.00 to her damage in amount of \$83,077.49.

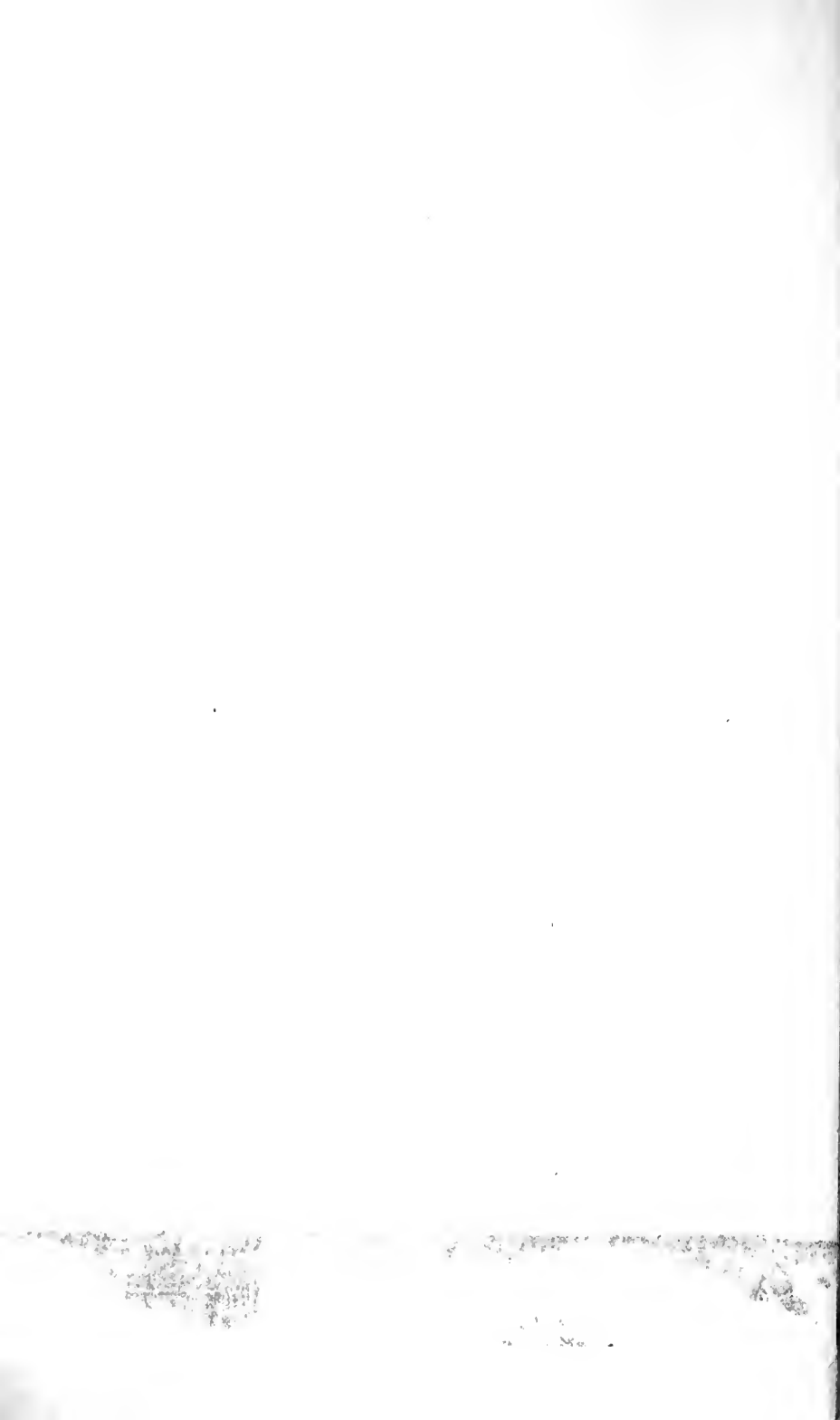
The District Court had jurisdiction over the cause and the Appellants to find the fraudulent scheme and award the judgment.

The action is not barred by the three year statute of limitations nor by laches.

The judgment of the District Court is supported by the Findings and the Findings by the evidence.

Mrs. Connell was in no way in pari-delicto with Appellants.

Judge William J. Lindberg who heard the cause in the District Court did not abuse his discretion in not



letting Errion postpone Mrs. Connell's day in Court indefinitely because of his alleged "battle fatigue" that arose after this action was commenced.

The motion to quash summons served on Appellant Violet Kellerstrass was properly denied. She suffered no prejudicial error in being held in the case after such motion was denied.

In the interest of justice, the judgment of the trial court should be affirmed with costs to Appellee.

Respectfully submitted,

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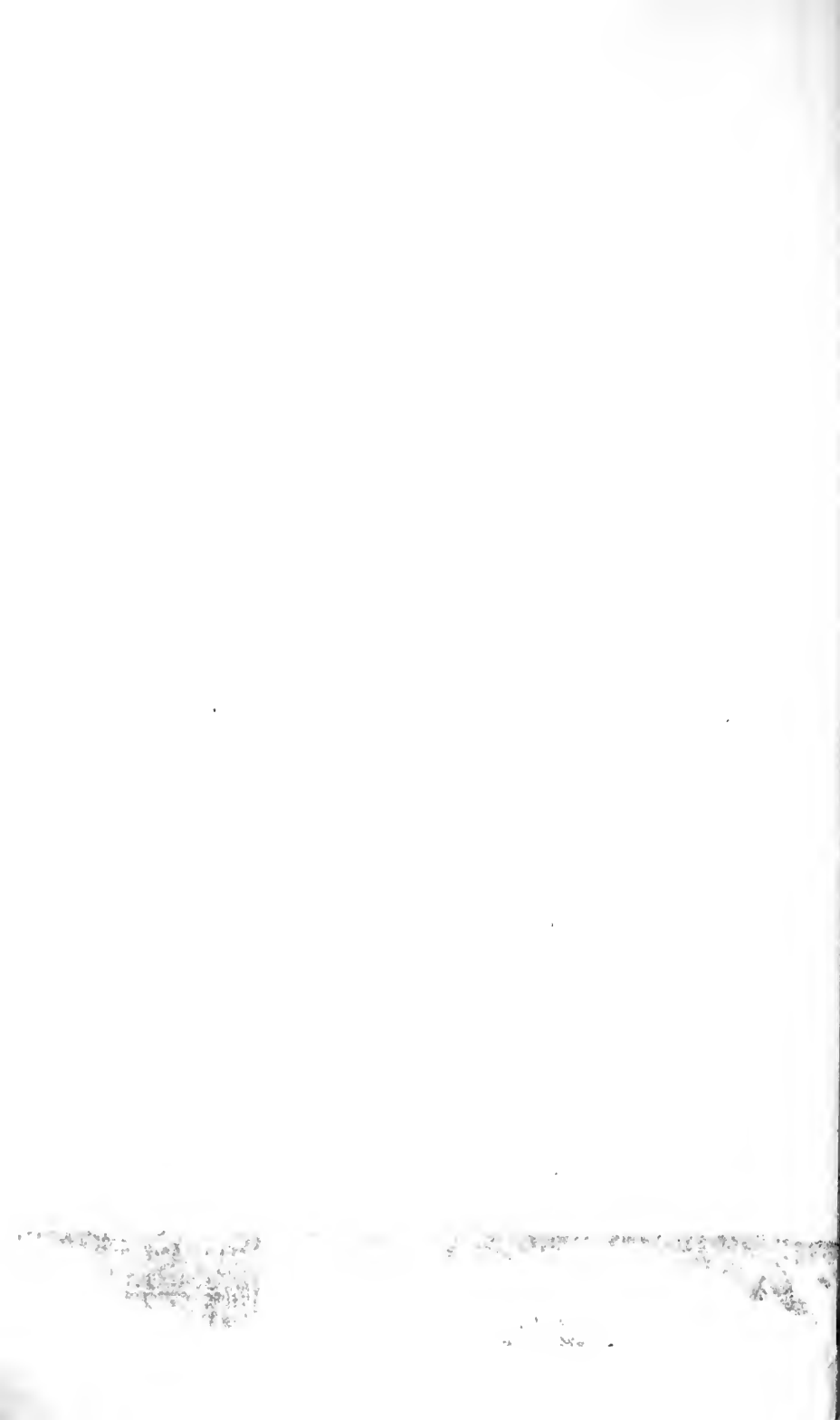
P R O C E E D I N G S

THE COURT: Well, Gentlemen, I believe I can give my opinion on the question of liability now. I reviewed my notes and I have studied the briefs and, of course, formed impressions as the evidence went in.

It is clear to me from the evidence as disclosed here that there has been a fraud perpetrated upon the Plaintiff, Mrs. Connell. It is clear that Mr. Errion was the principal perpetrator of that fraud in the first instance.

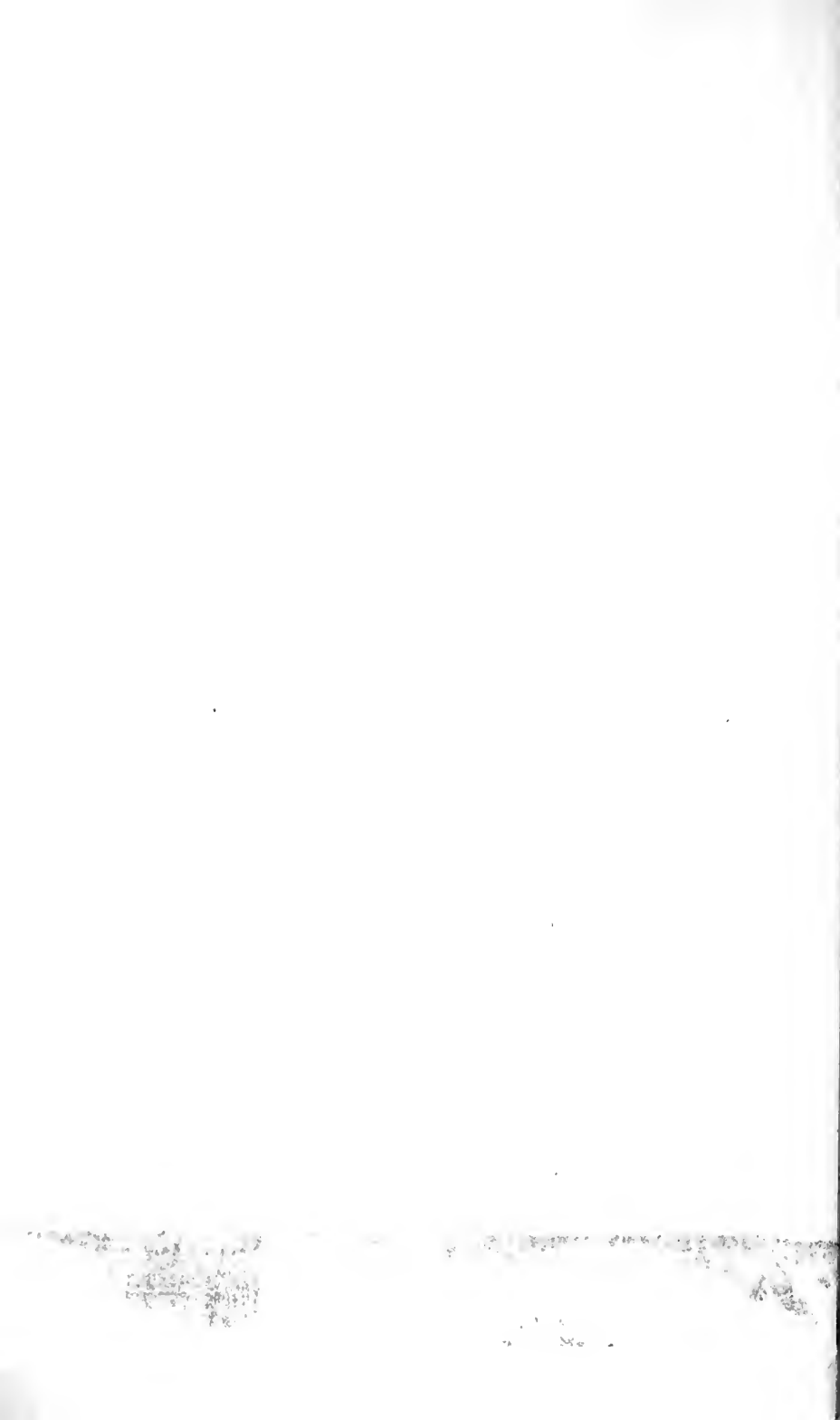
It appears to me, however, that when consideration is given to the development of the Holdorf Oyster Corporation and the transfer of these lands to Mr. Holdorf and his wife and to the corporation, the giving of a mortgage without value, the placing - the giving of a deed, placing revenue stamps on it to give indication of some - of an actual consideration by and participation of Mr. Holdorf in the original negotiations with Mrs. Connell, that establishes to my mind the fact that there must have been some understanding, tacit though it may have been, on the part of Mr.

Holdorf and between Mr. Holdorf and Mr. Errion, that this was a fraud that they were attempting to secure properties from Mrs. Connell, and securities, which I believe was all part - the securities, first - was all



a part of the transaction to obtain these properties and to give her in lieu thereof oyster lands of little value, or purported oyster lands.

While Mr. Errion, who apparently is a fantastic person, endowed with tremendous faculties and ability of persuasion - while the Court hasn't had the advantage of seeing him or hearing his side of the case it is obvious that he was able through his magnetic personality and charm and persuasiveness, whatever it may be, to make Mrs. Connell, and apparently in other instances such as the Skene case, believe that he was reliable and that he had land worth something and that he had a program whereby they could realize the value of their property in cash and possibly more in a short time through a proposed condemnation action and while he, Mr. Errion, was the principal perpetrator, it is difficult for the Court to believe that a man, unschooled perhaps, and as young as Mr. Holdorf indicates he is, couldn't have understood that this sale of oyster land which he participated in and helped formulate was - this whole scheme was - misrepresented and fraudulent and, therefore, I think there was at that time a tacit understanding between them and as Counsel know conspiracy need not have been a written or an oral agreement. Conspiracy can develop by - with lack of that. It may be inferred. A common course of action

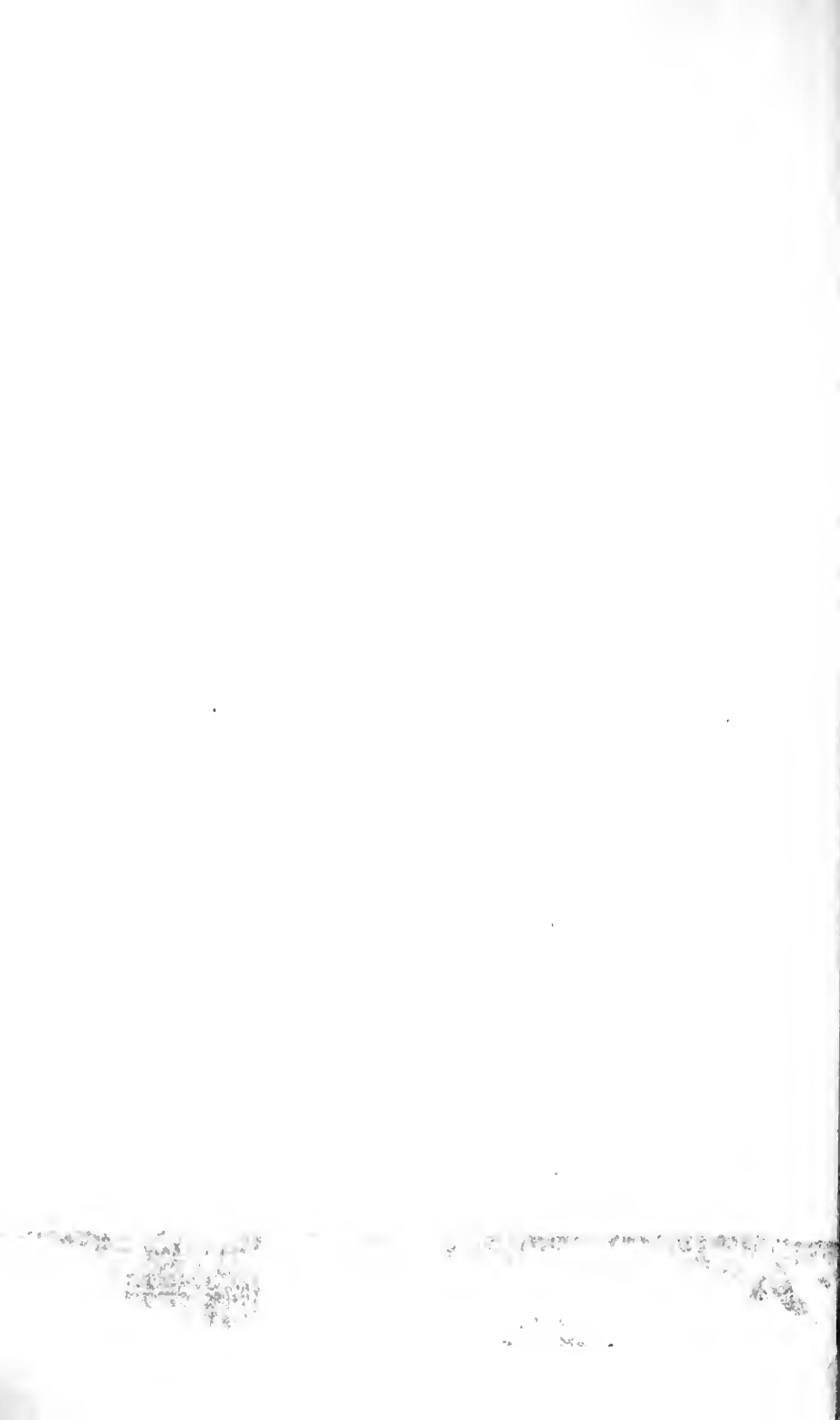


is sufficient, and participation in it, which there certainly was on the part of Mr. Holdorf and Errion at the outset, not only in the Connell matter by practically at the same time in the Skene matter.

Therefore, it would be the Court's finding that there did exist a conspiracy between Mr. Holdorf and Mr. Errion to defraud Mrs. Connell.

When it started, of course, I know not. That is not necessary. It was in existence, I think, at the time Mr. Errion and Mr. Holdorf negotiated this first sale of the contract in August or July or thereabouts; completed, in part, as far as the transfer of Mrs. Connell's property, in October.

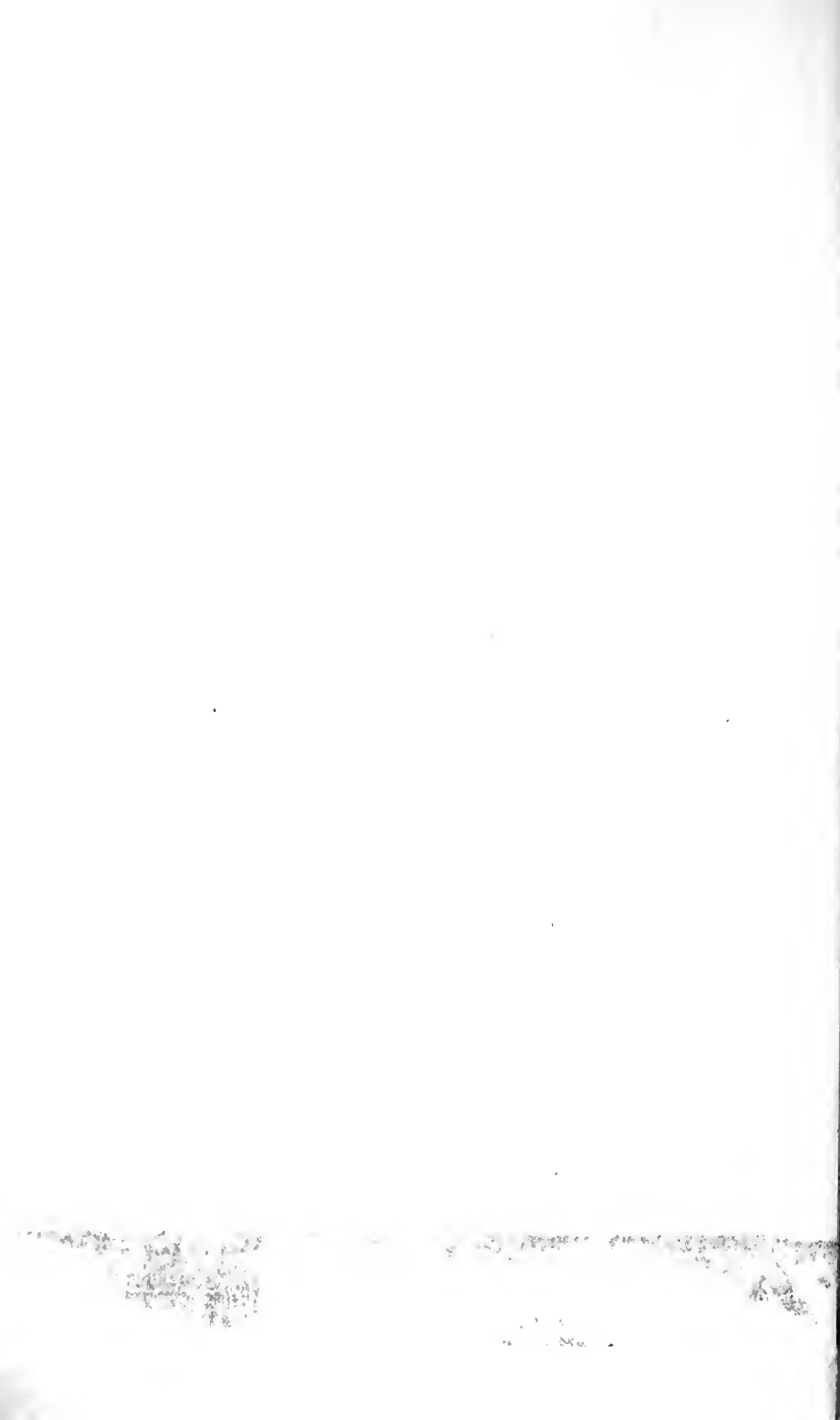
Following the matter down through the course of the other Defendants, I think the wife, Mrs. Holdorf, became a part of that conspiracy, and while it is true that the many acts done by Mrs. Holdorf and Mr. Holdorf were and could be by themselves innocent actions, when they are considered in connection with the course of this whole transaction, the fact that certain actions were taken, such as the incorporation and the signing by Mrs. Holdorf of the papers in that connection, and the issuance of stock and the transfer of stock then to Mr. Errion without being entered on the records, and the witnessing of the contracts involved, the participation of Mrs. Holdorf on a later occasion when the



mortgage was given on the Mount Helen property and then the note endorsed, those are things, a combination of circumstances and actions over a period of time, which would indicate more than innocent participation of one performing administrative acts. Mrs. Holdorf was not performing these acts as a wife of a Defendant, Holdorf but was performing them as an active officer of the corporation and one engaged in this whole business enterprise and certainly over the whole course of this period she must have had some knowledge, and the Court so finds, of this whole scheme and participated in it with such knowledge.

As to Mrs. Amy Errion, there again we have her performing acts which in some instances are innocent enough and under some circumstances might be considered laudable, such as entertaining and visiting Mrs. Errion.

One married to one such as Mr. Errion, again you form an impression of him from testimony in the case not having the benefit or advantage of seeing or hearing him, certainly a wife of such a man must have had some idea that he was engaged in some rather fantastic scheme or promotion. It seems from the evidence that she has participated in this transaction not only in a casual way but in a very essential fashion, it seems to me.



She originally took delivery of some securities and took them to Merrill-Lynch and had them sold and she was present on occasions when there were meetings between Mrs. Connell and Mr. Errion. That is, when they were - they may have been social affairs but nevertheless on those occasions it would appear that mention was made of these transactions, and particularly in the early days, in the Summer of 1949. Later on, Mrs. Errion was with Mrs. Connell in California. I think it is reasonable inference to believe that that trip to California was part of a scheme to, or program to, keep Mrs. Connell from suspecting the fraud that had occurred and was continued.

So, I believe, likewise, Mrs. Amy Errion was a part of the conspiracy and participated with knowledge.

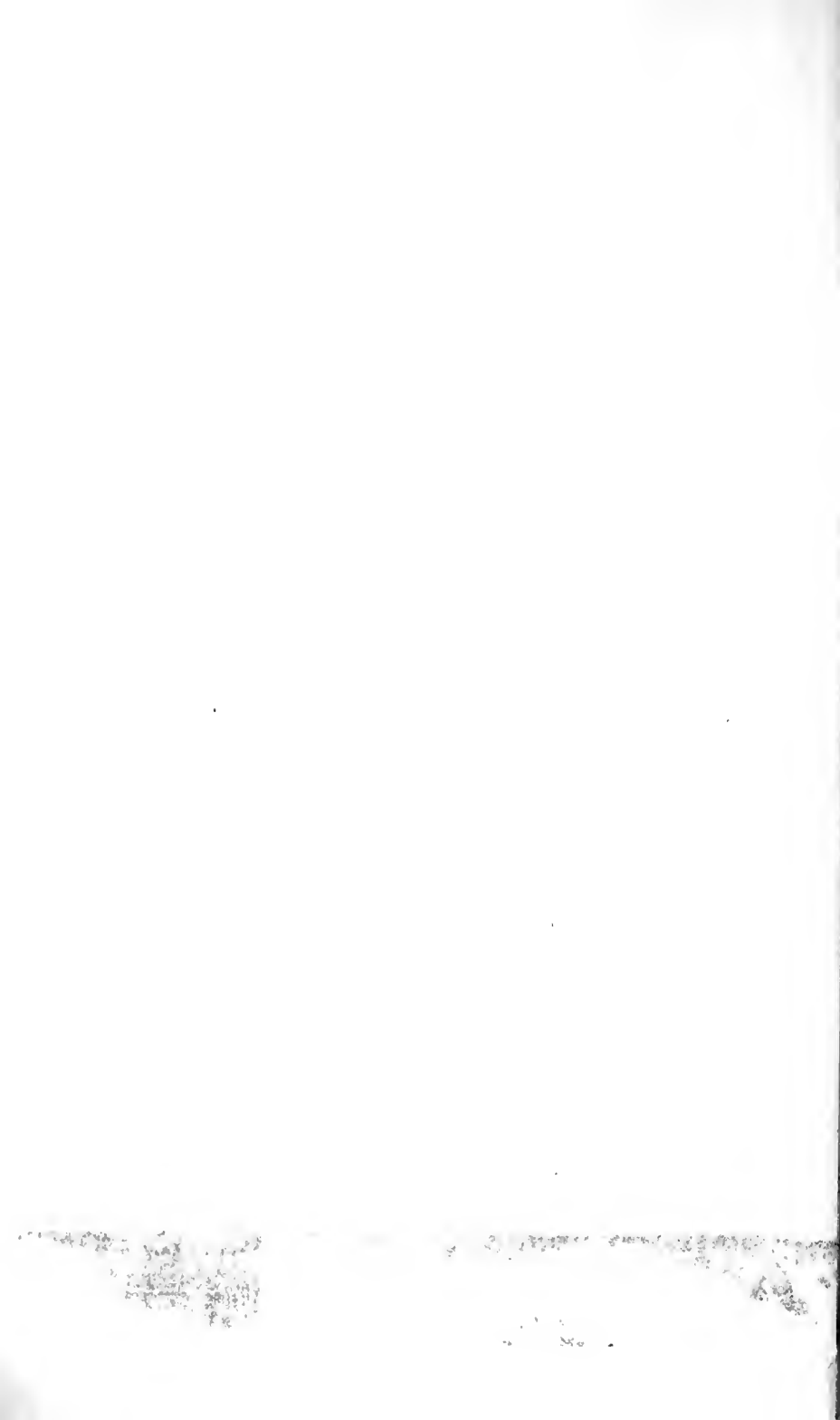
Of course, in these conspiracy cases, as the courts have so many times held, you can not secure evidence of specific - could not secure direct evidence of the conspiracy. Conspiracies are not spelled out or written out. They are so many times undisclosed and they have to remain such or there would be no realization of their purpose. Therefore, it is a common case where you have nothing other than circumstances, such as happened in this case, which are to my mind conclusive of the existence of a scheme and conspiracy to defraud.



Likewise, the situation as to Williamson. The story on the stand seemed to me to be rather almost unbelievable to think that a man would get into the oyster business having looked at oyster beds on the Atlantic Coast at one time and having come out here and heard about it and undertakes an agreement such as here seems to me to be almost unbelievable. He certainly entered into this agreement and carried along with it, and indicated, as Counsel for the Plaintiff stated, in a letter written that he had intended to develop the oyster lands and had failed to do so because of silt and at that time he hadn't been down there, as I recall the evidence, and received the money from Mr. Holdorf to make the payments under the contract, all of which indicates a design on the part of everyone who participated in it of keeping Mrs. Connell from learning just how she had been swindled.

Perhaps they had in mind that she might not live long enough to bring them to justice. The Court doesn't intend by that statement to make a finding of such but in speculation that might have been a thought that crossed their minds.

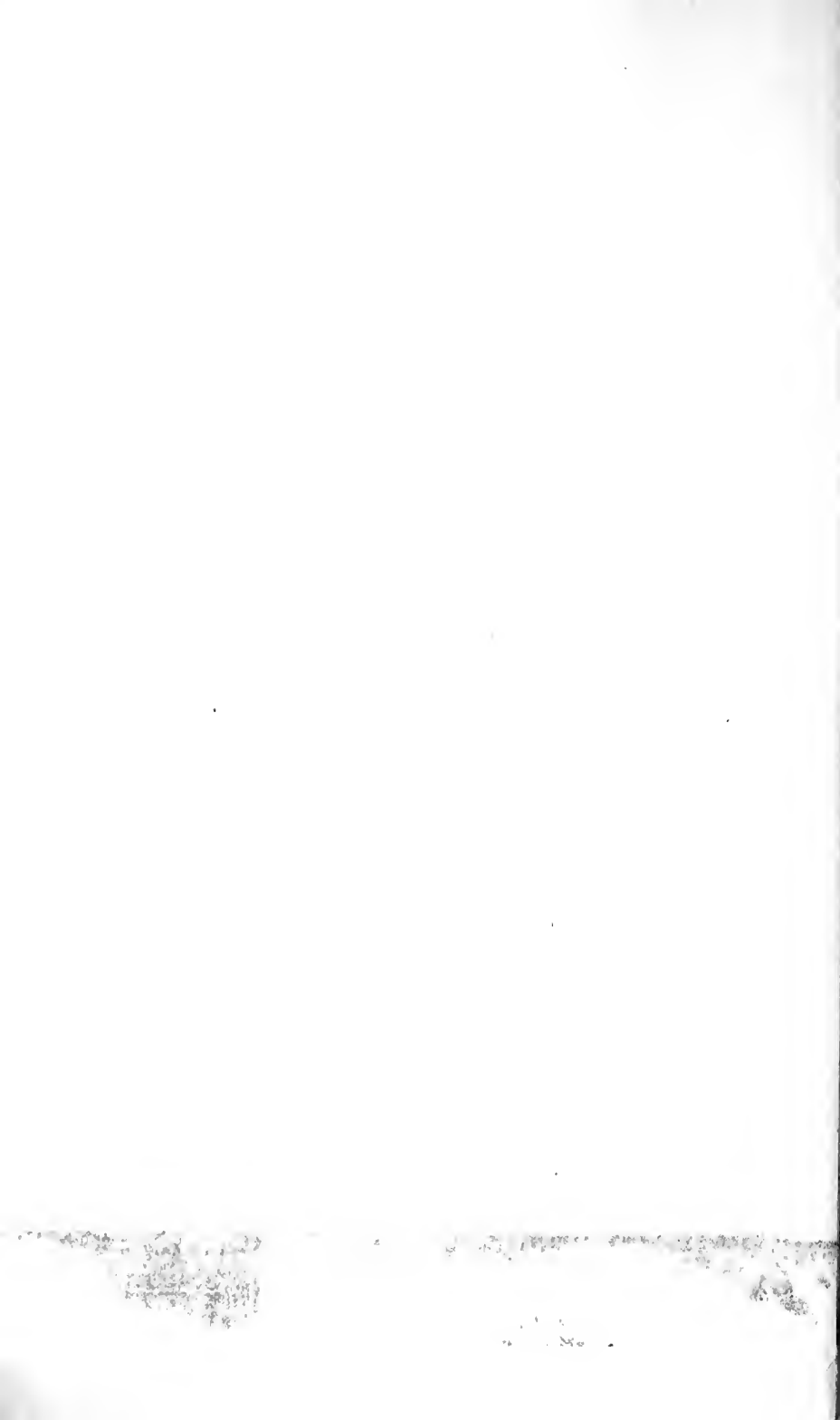
As to Mrs. Kellerstrass, I recall her statements on the stand and her attitude and response. It is rather difficult to reconcile the testimony she gave with one who undertook the sale of this property on



Twelfth Avenue, or Fourteenth Avenue. She was a sister and participated with Mr. Errion and engaged in this program and must have had knowledge. She couldn't have undertaken the sale and come up here and secured the funds and sign the instruments and secure the cashier's checks and divide them among the various persons without having some knowledge of this whole thing and, therefore, she likewise, I believe, was a part of the conspiracy.

Now, the fact that Mrs. Connell on another occasion testified as she did in what is known as the Kinel case that she on this occasion loaned some money when she gave her securities to Mr. or Mrs. Errion and that it was a separate transaction - or that was the effect of her testimony - and the transaction she had with Holdorf, certainly that does tend to impeach her testimony and it might be such as would discredit her as a witness. On the other hand, when you look at this whole transaction it seems apparent that Mrs. Connell was completely sold, so to speak, on Mr. Errion and was willing to accept his statements without much challenge.

The mere fact that she would go into this transaction indicates the persuasive powers of this man and she went down there and he talked with her and while



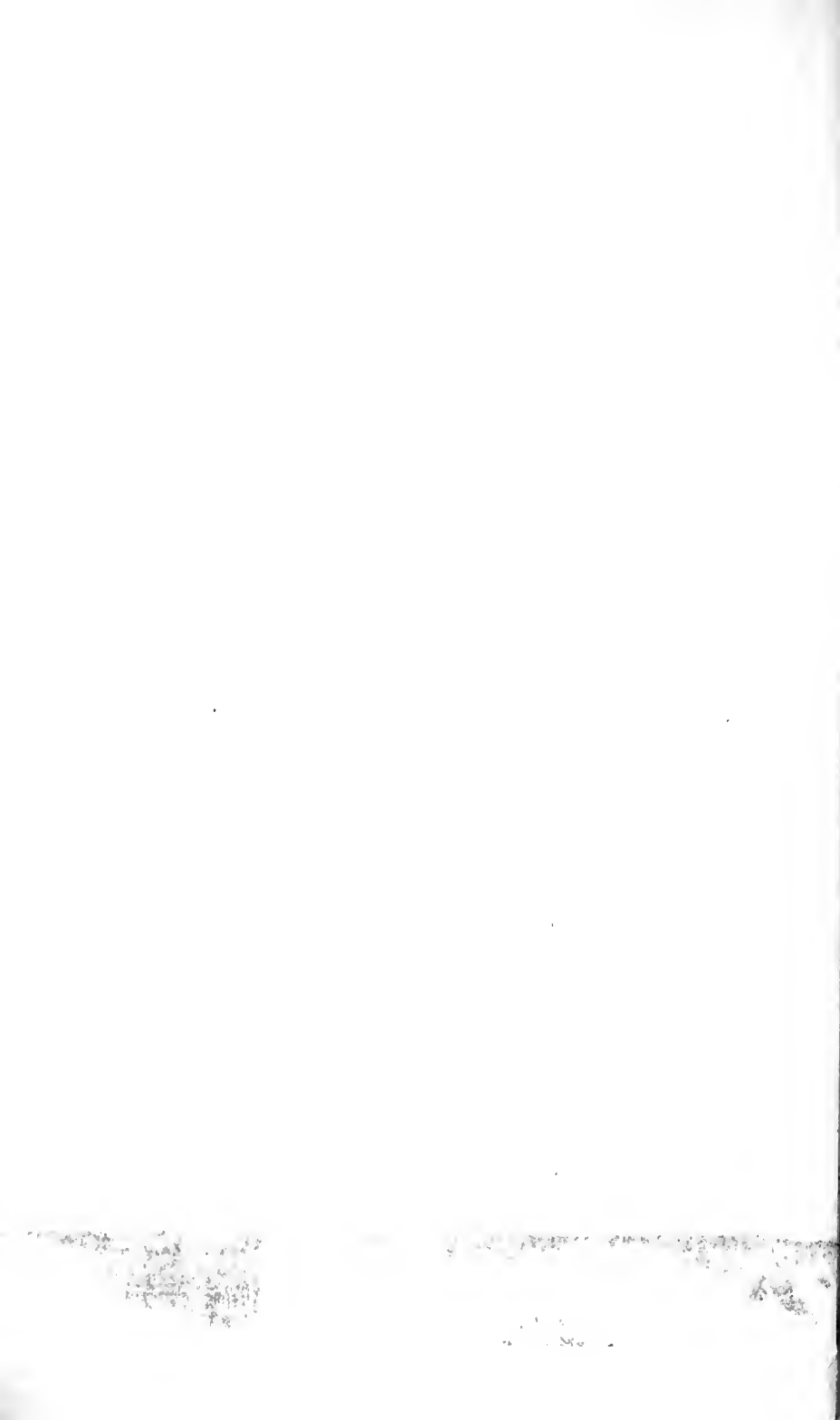
he didn't tell her what to say I think she was so under his influence that she testified in that respect because she didn't fully appreciate what the circumstances were.

So, I can not on that testimony discredit Mrs. Connell's testimony, particularly when the whole transaction seems to be borne out by other - by facts as they are disclosed, not by testimony but by transactions as they unfold, and I can't help but believe that the Skene transaction serves to establish the pattern and also the intent of Errion and Holdorf in this transaction.

Coming to the, and likewise as to the, impeachment of Mr. Holdorf. Certainly he was impeached. His story on the stand was completely at variance with certainly a large portion of the testimony given in the deposition.

He told the Court he was absent from the court room because of an ulcer condition. I can't help but believe that when he testified here on the stand that day he was attempting to make a clean breast of it and when the Court review's some of that testimony in the deposition I can well understand how he might be suffering from ulcers in view of the utter contradictory statements made.

So, while Mr. Holdorf's testimony isn't to be relied on because it is certainly impeached, other



circumstances would seem to cause the Court to give credit to the testimony as he gave it on the stand.

As to the theory of the defense is *peril delicto*: Of course, it is wrong and unlawful to establish false values, or transactions other than bona fide transactions to establish the value of property under condemnation proceedings. Possibly Mrs. Connell was wrong in some degree. It is questionable whether she knew about that, however, and certainly the transaction wherein she was giving up, whether it was 110 thousand or 115 thousand or 120 thousand or 150 thousand dollar property, whatever the value, she was giving a very substantial amount of property for, what it now develops, was worthless, or almost worthless, oyster land, as the evidence shows. So, she was not engaging in a wrong, at least at that time, and as Counsel stated and argued in the brief, the condemnation action involved was dismissed. So therefore, there was no wrong committed other than possibly a morally wrong action in that it resulted, if completed, in some irregularity at least. However, it did not happen and I don't think, even if the Court were to assume there was some irregularity or unlawfulness on the part of the conduct that it was such as to deprive the Plaintiff of her right of action

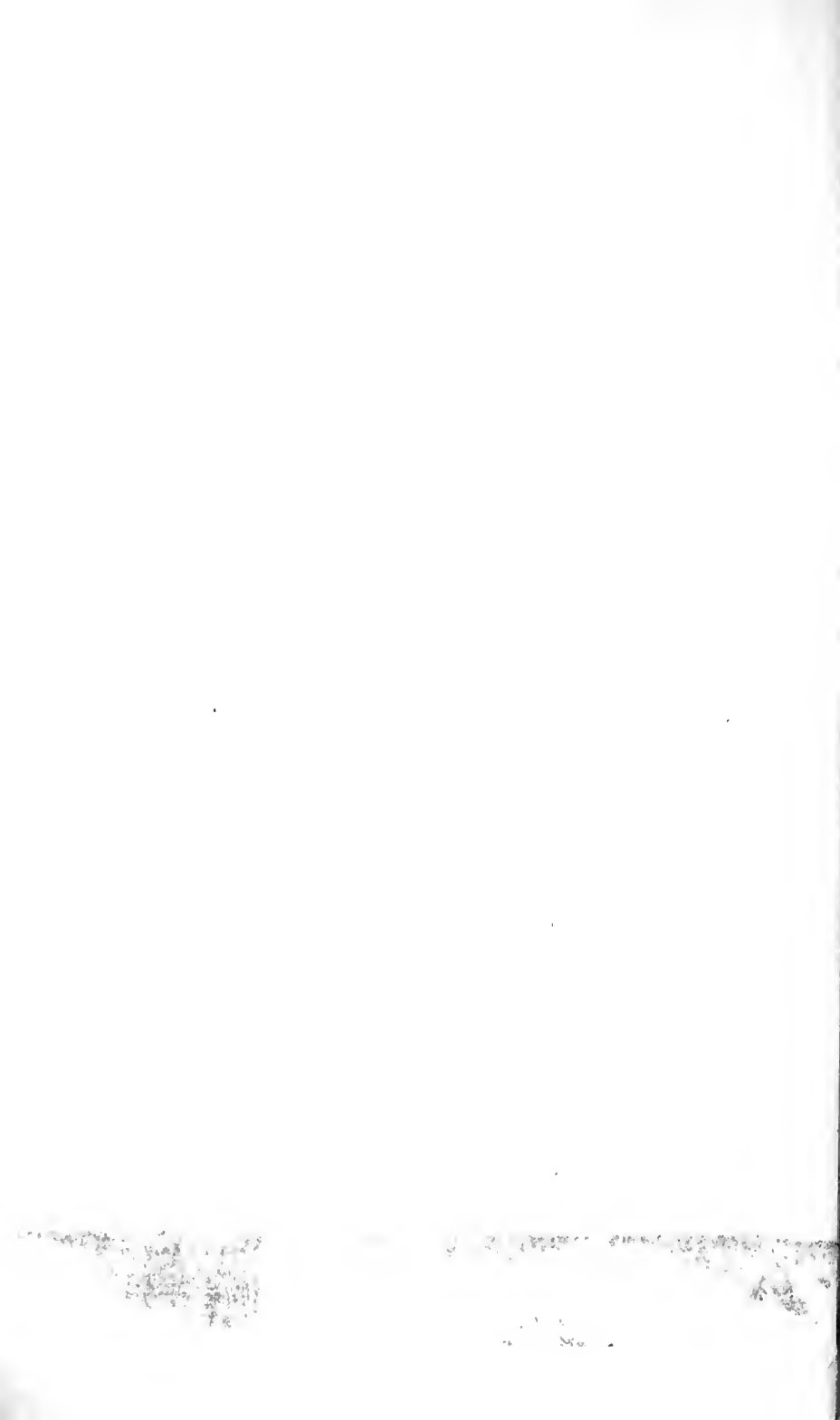


in this case and that Court does not recognize that that is an available defense in this case.

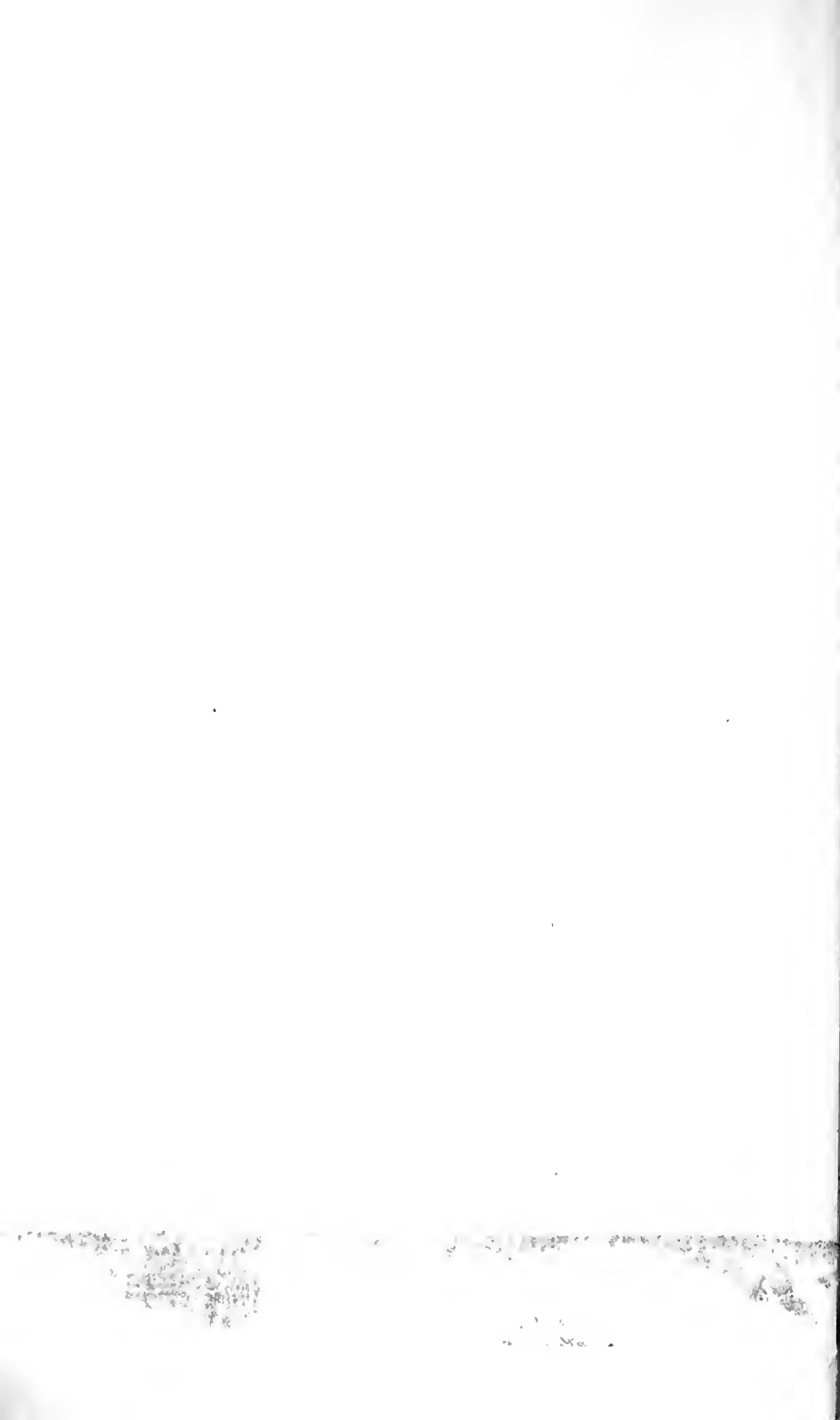
I believe I have covered all the --

MR. WHITE: How about Holdorf Oyster Corporation?

THE COURT: The Holdorf Oyster Corporation, of course, I think being an involved corporation, is an instrumentality and liable and the Court will also find them liable.



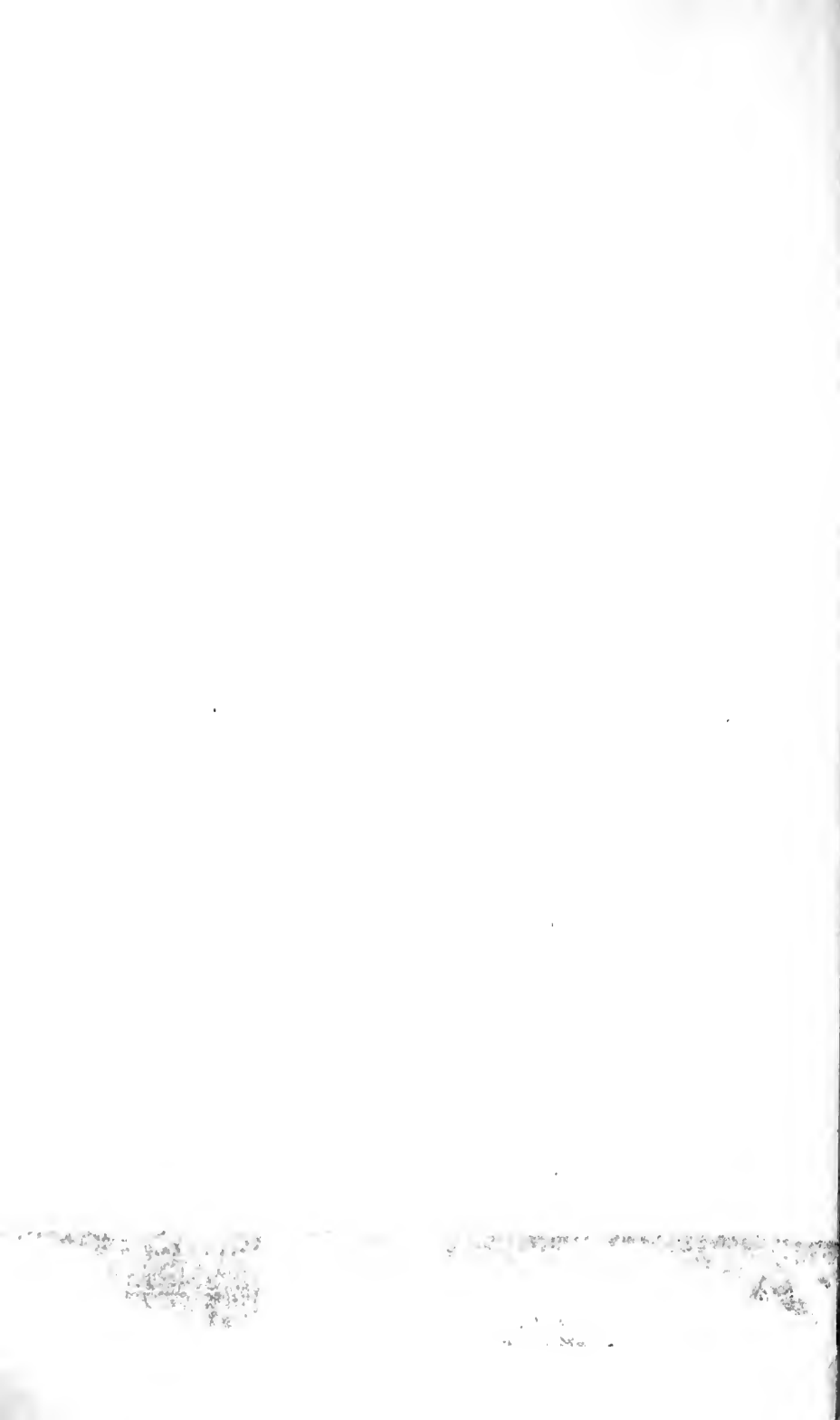




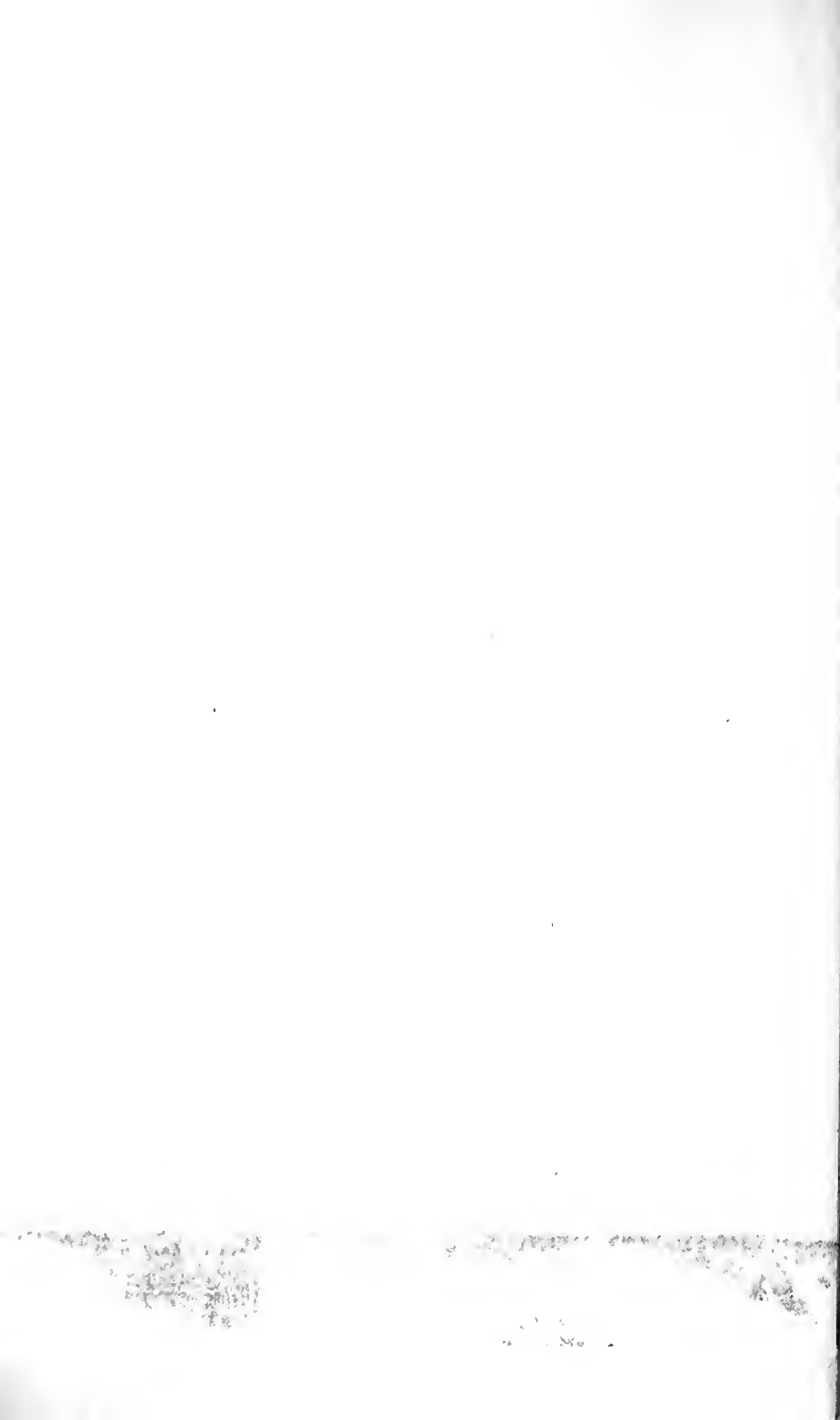




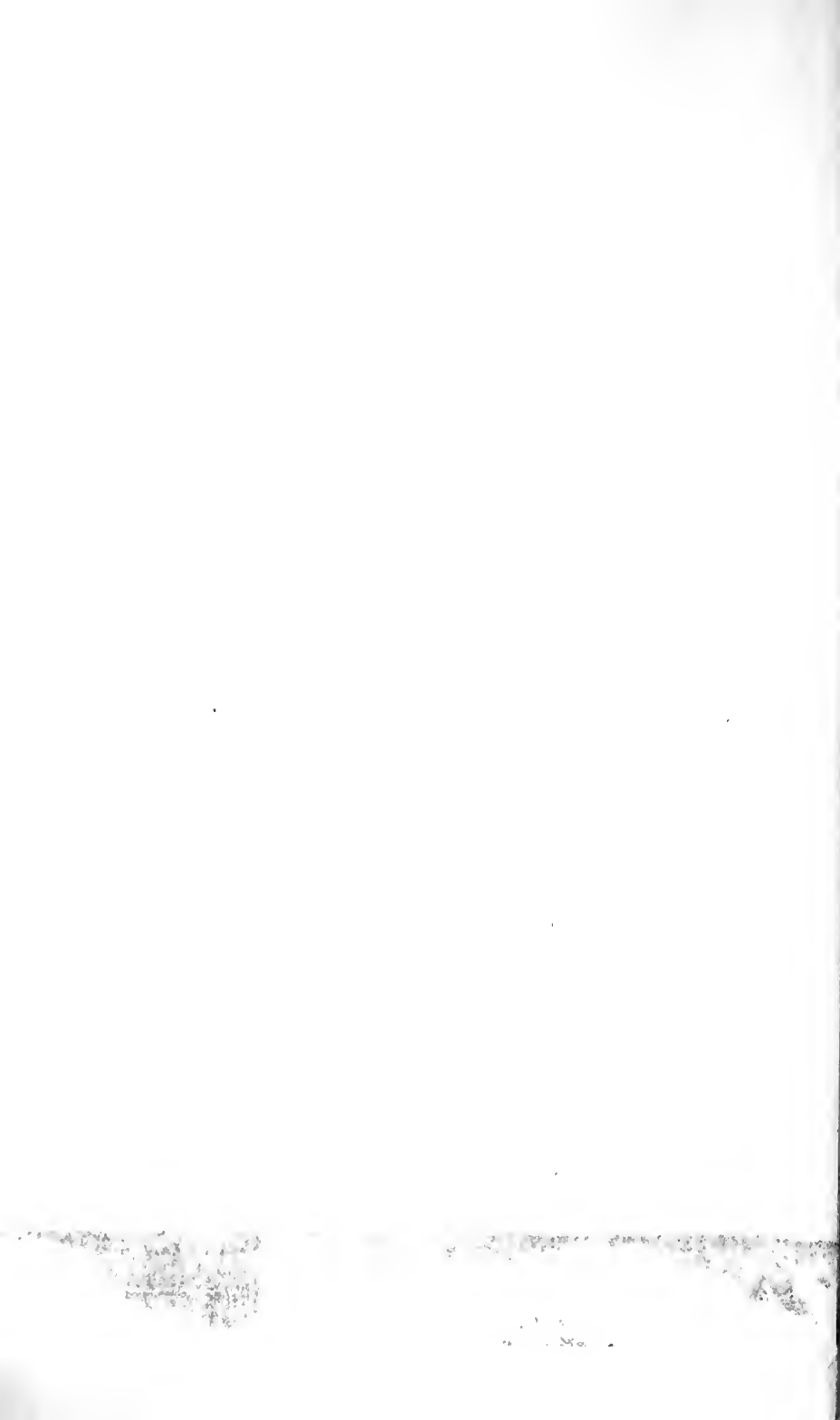


















No. 14797

es Court of Appeals
the Ninth Circuit

NELL, *Plaintiff-Appellee,*
vs.

N, also known as E. R. ERRION and
ERRION, VIOLET KELLERSTRAUS, and
N, *Defendants-Appellants,*

OPAL HOLDORF, HOLDORF OYSTER
ashington Corporation, INAR GLAS-
ER, KATHERINE GOLD, H. A. DAVEN-
as LEE DAVENPORT, CORA SCOTT,
Defendants.

UNITED STATES DISTRICT COURT



No. 14797

es Court of Appeals
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UNITED STATES DISTRICT COURT
DISTRICT OF WASHINGTON

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U. S. Court of Appeals for the Ninth Circuit

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S.

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B ERRION, AMY ERRI-
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Defendants-Appellants,

No. 14797

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ORATION, a Washing-
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E GOLD, H. A. DAVEN-
as LEE DAVENPORT,
Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF WASHINGTON
NORTHERN DIVISION

Appellee's Statement of the Case

Sixteen pages of appellee's brief consists of her statement of the case. With only one or two exceptions, all citations to the record refer to testimony of Dwight Holdorf, Marguerite L. Connell, appellee, or merely refer to the findings entered by the trial court.

In our opening brief we pointed out that the testimony of both Dwight Holdorf and appellee was substantially impeached and hence was not of a character sufficient to support a fraud judgment. This has been almost completely ignored by appellee in her brief.

We are even less impressed with the numerous references to the findings of the trial court. More than one-third of all record citations in appellee's brief are merely to the findings of the trial court. The question before the Court respecting the findings is whether or not the evidence supports such findings. It is of no help to cite the findings themselves, and it is appellants' position that there is no evidence to support a very considerable number of the findings of the trial court. We will treat this matter more specifically in discussing the several portions of appellee's brief.

Amount and Number of Securities Involved in Single or Separate Transactions

In this portion of her brief appellee seeks to lump together all of her properties and to indicate that there was but one single transactions between appellee and the other parties, including appellants.

As pointed out at page 19 of appellant's opening brief, there was only one transaction with appellant, Errion, as to which no fraud whatsoever is alleged or

of the remaining transactions were
 rf, acting for the Holdorf Oyster
 is correct, it is of no importance
 involved in the second transaction,
 and the authorities cited by appellee
 her brief do not support her con-

Co., etc., v. United States (D.Ct.
 . 1019, and *Trenton Cotton Oil Co.*
) 147 F.(2d) 33, are nowise in point.
 case held that the particular items
 re not securities. Neither case in-
 a of the Securities Exchange Act.

ses cited on page 18 of appellee's
 an investment contract or invest-
 d there can be no analogy whatso-
 nstruments and any of the instru-
 -her

The case of *Joy v. Pagel* (Mich. 1939) 283 N.W. 646, cited by appellee at page 19 of her brief, simply held that where the purchase of treasury stock from a corporation was induced by the promise to take it off the purchaser's hands at a stated price on or before a certain date, there was but a single contract.

At page 20 of her brief, appellee states that Errion's note (Exhibit A-3) was a security. Appellee neglects to state, however, that it is undisputed that this note was transferred by appellee to Dwight Holdorf.

Jurisdiction by Reason of the Securities Exchange Act and Rule X-10b-5

The first sentence of this sub-division of appellee's brief, appearing at page 20 is apparently intended to be facetious. The humor is not appreciated. The record clearly indicates that from the very inception of this action in the fall of 1953 to the present date, appellants have contended that the District Court lacked jurisdiction in this proceeding.

We have no quarrel with the authorities cited by appellee at pages 22 and 23 of her brief upon their particular facts. The first group, commencing with *Fratt v. Robinson* (9 Cir. 1953) 203 F.(2d) 627, and ending with *Mills v. Sarjem Corp.* (District Court June, 1955) 133 F. Supp. 753, merely affirm the rule that a civil action may be brought. Each involved either corporate securities and stock or municipal bonds and in point of fact, the last cited case held that no fraud had been proved. None is authority to uphold the jurisdiction of the District Court in this case. We have previously dealt with the question of jurisdiction in the first por-

t in our opening brief commencing

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any notes and instruments in this
est in the same.

ted on page 24 of appellee's brief,
a motion or demurrer to the plead-
ing whether there was alleged one
action. None is in point.

xpressed statement of appellee at
24 of her brief, appellants have
that securities and non-securities
gled in this action and none of the
appellee hold to the contrary.

appellee at page 25 and 26 of her
nts the conclusion of counsel in an
within the jurisdiction of the Dis-
tributary makes appellee's burden of

brief of the Securities and Exchange Commission which appears on page 26 and 27 of appellee's brief, is inserted solely for any possible influence it might have upon this Court. We have no objection to any position which the Securities and Exchange Commission might take in a proper proceeding. We do not believe its opinion is of value to the Court.

The case of *Birnbaum v. Newport Steel Corp.* (2 Cir. 1952) 193 F.(2d) 461 cited at page 27 of appellee's brief, in point of fact affirmed a judgment dismissing an action since the action involved only fraudulent mismanagement of corporate affairs, and the Court held that was not within the purview of the Securities Exchange Act.

“Pendent” Jurisdiction

This portion of appellee's brief, commencing at page 27, is entirely new and was not raised at any time in the trial court. It is obviously an attempt to bolster the jurisdictional position claimed by appellee.

The leading case on this subject is the case of *Hurn v. Oursler* (1933), 289 U.S. 238, 77 L.Ed. 1148. This case is cited by appellee at page 29 of her brief, and most, if not all, of the remaining cases cited by her under this subdivision are predicated upon the reasoning in the case of *Hurn v. Oursler*. At page 1154 in 77 L.Ed. the Supreme Court states the correct rule as follows:

“But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause

distinction to be observed is between two distinct grounds in support of an action are alleged, one only of which is a federal question, and a case where two distinct causes of action are alleged, one of which is federal in character. In the former the federal question averred is not sufficient; in substance, the federal court, if the federal ground be not established, must retain and dispose of the case upon the non-federal ground; in the latter it may dispose of the non-federal cause of action."

It is that in the case at bar appellee's seeking recovery of damages arising from the destruction of her several properties, involve two distinct causes of action. This is vastly different from the actual situation in the case of *Hurn* where the plaintiff was involved claims of infringement and unfair competition resting upon identical

The rule in civil cases is entirely different than that expressed in the cases cited by appellee. This is clearly brought out in the case of *United States v. Grayson* (2 Cir. 1948) 166 F.(2d) 863, which is cited by appellee, and in which case at page 866 of its opinion the Court of Appeals for the Second Circuit expressly points out that a different rule applies in civil cases.

At page 33 of her brief appellee states that jurisdiction is satisfied "if any act or any transaction of the offending fraudulent scheme occurred in the Western District of Washington." That statement is not supported by Section 27 of the Act (15 U.S.C. § 78AA) nor the cited case of *Robinson v. Difford* (D.Ct. Pa. 1950) 92 F.Supp. 145. In point of fact both the act and the *Robinson* case require that "any act or transaction constituting the violation" must occur within the district. The "violation" obviously relates to violation of the Securities Exchange Act, itself.

At pages 33 and 34 of her brief appellee seeks to set forth a number of instances occurring within the jurisdiction of the trial court. Many are incorrect. There is no evidence that "most, if not all, of the fraudulent statements attributed to Errion were made in appellee's home." There is a complete lack of evidence that the transaction involving the corporate stock and the promissory note (Exhibit A-3) occurred in Seattle. The only evidence as to any typing done by appellant, Amy Errion, was the very unsatisfactory evidence of appellee. The evidence as to the presentation of the receipt (Exhibit A-5) was from Holdorf. There is no evidence to support the statement that the deed to the tidelands was delivered to Mrs. Connell in her home,

in Seattle for Olson to sell the Bo-
the Rankin contract. It is true that
erty was sold in Seattle and de-
orf's bank account in Vancouver.
Corporation is a Washington cor-
timony concerning that came sole-

appellee's case to refer to the "loot"
5 of her brief.

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ent relative to the statute of limi-
been covered in our opening brief.
t out that all of the testimony re-
e under this portion of her brief,
wn testimony or merely is a refer-
f the Court.

it is worthy of note that appellee,

repeated statement in appellee's brief that the visit in California in 1950 had any ulterior purpose whatsoever, and, of course, particularly, that appellant, Amy Errion, had the slightest connection with any ulterior purpose. Finding No. XXI of the Court (R. 123-Vol. II) has no support whatsoever in the evidence.

The Court's attention is especially commended to the case of *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 177 Pac. 810. Appellee quotes from that case at page 38 of her brief. The decision, however, affirmed a judgment dismissing the action by reason of the statute of limitations, and in many respects the case is at all fours with the case at bar. Among other things, the Court said:

“We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein. *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117; *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955; *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 Pac. 984. And that,

“ ‘Whatever is notice enough to excite attention and put the party on guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.’ . . . ‘The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.’ *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561.

frauded must be diligent in making means of knowledge are equivalent to a clue to the fact which, if followed would lead to discovery, is in law a discovery. *Norris v. Haggin*, 28 *v. Holbrook*, 32 Wash. 349, 73 Pac. *alland*, 53 Wash. 504, 102 Pac. 440; *alcaby*, 78 Wash. 9, 138 Pac. 314.

'seeking to rescind for fraud or false must do so within a reasonable right is lost by failure to act promptly of the fraud, or after it might have d by the use of due diligence.' 13

brief appellee quotes from the case *o M. & St. P. Railway Co.* (District on, 1915) 224 Fed. 196. We believe pful to the Court to quote the entire ch appellee has taken the language ef. That paragraph is as follows:

signed a release a year prior to the expiration of the period of limitation. The bill shows on its face that immediately after signing the release plaintiff grew worse and began to suffer from the complication of diseases which he refers to in his bill. Plaintiff must be held to his knowledge, and likewise to the exercise of ordinary diligence in the prosecution of his action, and in seeking relief from the conduct complained of; and if he fails to exercise this diligence, equity will not suspend the operation of the statute. The Circuit Court of Appeals of this circuit, in *Newberry v. Wilkinson*, 199 Fed. 673, at page 688, 118 C.C.A. 111, in disposing of the right of a minor who was fraudulently induced to sign away certain property rights, said:

“ ‘Reasonable attention to an affair peculiarly his own, would have led plaintiff, at least soon after his arrival at age, to the possession of all the knowledge he acquired immediately prior to the bringing of the suit. But he delayed the institution of his suit until the statute of limitations had fully run against him and in favor of the surety. * * * We are of the opinion that, had the suit been seasonably instituted after the plaintiff became of age, the bar of the statute of nonclaim would not have stood in the way of his recovery, and of course, had the suit been brought but a few days earlier, the statute of limitations * * * would not have run at all. We are impelled to the conviction, however, that the delay suffered by plaintiff after he was in possession in possession of information challenging further inquiry on his part, and after he had arrived at legal age, * * * amounts to *laches* on his part, and a court of chancery will not now interpose to remove the bar of either of such statutes of limitation, nor will it afford him the relief prayed.’ ”

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ge 39 of appellee's brief, the Court
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llee at page 40 of her brief is of no
that case the Supreme Court of the
affirmed the trial court in holding
and or duress under the particular

ot Supported by the Evidence

er brief appellee discusses the bur-
dertakes to criticize appellants for
every bit of evidence in support of
of the thirty-six separate findings
wise than we have done, would be
and our opening brief to such a

tached to appellee's brief, to-wit, that she was Errion's wife.

Likewise the evidence as to appellant, Violet Kellerstrauss, and appellant, C. W. Williamson, referred to at pages 44 and 45 of appellee's brief, fall far short of the character of evidence required to sustain an action of this nature.

The authorities relied upon by appellee under this portion of her argument are not in point. The two cases from the Court of Appeals cited at page 41, *Norris & Hirschberg, Inc., v. S.E.C.* (D.C. Cir., 1949) 177 F.(2d) 228, and *Charles Hughes & Co. v. S.E.C.* (2 Cir., 1943) 139 F.(2d) 434, each involved the review of an order of the Securities and Exchange Commission revoking the license and registration of a stock broker. Each involved the sale of securities and was limited to the particular facts in the respective cases. Neither involved a civil suit for damages.

The case of *Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane*, 85 F.Supp. 104, also cited at page 41, was a civil suit. The question of the burden of proof, however, was not discussed by the Court.

Upon their facts, the cases cited by appellee at page 42 are utterly dissimilar from the case at bar. *Holmes v. United States* (8 Cir. 1943) 134 F.(2d) 125 was a criminal case to which we have previously referred. *Dellefield v. Blockdel Realty Co.* (2 Cir. 1942) 128 F.(2d) 845, held that to prove fraud one must establish knowledge on the part of the one making statements and an affirmative intent to deceive.

s v. British Mortgage Co. (5 Cir.
3 was an action to rescind a real
was predicated entirely upon the
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conspiracy and fraud may be proved
evidence. This, however, does not
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d to which we have referred in our

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viously said in our opening brief
is, we believe, a sufficient answer
tions raised by appellee at pages

Motion of Appellant, Violat Kellerstrauss, to Quash Service

This matter, also, we believe, has been sufficiently covered in our opening brief.

CONCLUSION

For the reasons expressed in our opening brief, the judgment of the United States District Court for the Western District of Washington, Northern Division, should be reversed.

Respectfully submitted,

OLWELL AND BOYLE

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THOMAS C. BOYLE

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Seattle, Washington











